United Nations

A/HRC/30/39

General Assembly

Distr.: General
5 August 2015

Original: English

Human Rights Council
Thirtieth session
Agenda item 3
Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report of the Special Rapporteur on the human right to safe drinking water and sanitation

Summary

Access to affordable water and sanitation services is crucial for the realization of the human rights to water and sanitation. Yet, the issue of affordability does not always receive the attention it deserves. The present report seeks to address this gap and to define affordability from the perspective of human rights. It discusses the importance of setting concrete standards to determine affordability, including for those populations that do not receive formal services. It puts affordability in the broader context of ensuring environmental and economic sustainability, and discusses the impact of disconnections as a result of inability to pay. The report discusses who benefits from public financing in current practice, and then considers a variety of different mechanisms to ensure affordability of services for all through public financing and devising appropriate tariff schemes, including their advantages and challenges. Finally, the report discusses the importance of regulating and monitoring affordability before providing conclusions and recommendations.

GE.15-13098(E)

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I. Introduction

1. The present report is submitted in accordance with Human Rights Council resolution 24/18. Access to affordable water and sanitation services is crucial for the realization of the human rights to water and sanitation. Where water or sanitation services are available but not affordable, people will not be able to use sufficient amounts of water and adequately maintain latrines, or will turn to cheaper, unsafe sources or practices, or will compromise the realization of other human rights such as food, housing, health or education. However, the issue of affordability does not always receive the attention it deserves. As people will go to great lengths to pay for water to ensure their survival and health, there is often an assumption that people will obtain the water they need even without State support. Similarly, monitoring practices sometimes assume that people have access without considering whether they can actually afford services. The results of this neglect on people's lives, well-being and human rights are devastating.

2. Ensuring affordability is complex and requires different interventions in different contexts. People's capacity to pay for water and sanitation differs depending on their socio-economic situation, as well as the method of service delivery. States must find ways of guaranteeing affordability, especially for the most disadvantaged individuals and communities, while also ensuring overall sustainability of services.

3. This report considers the affordability of water and sanitation at the household level. The State's obligations to ensure affordable access to water and sanitation in institutions – such as schools, health centres and prisons – or at work and in public spaces is also essential, but is beyond the scope of this report. State obligations in institutional contexts are different and may require direct provision. In any case, affordability should never be a barrier for children, women and men to accessing water and sanitation when they are outside the home.

4. From the perspective of human rights, the starting point for State decision-making on public financing and policy for water and sanitation service provision is that water and sanitation must be affordable to all. This differs starkly from the purely economic perspective. The focus in the context of water and sanitation services tends to be on cost recovery, whether full or partial. Economic perspectives and human rights perspectives are not impossible to reconcile, but human rights require ensuring affordable service provision for all, regardless of ability to pay, and economic instruments must be (re-)designed to achieve this objective.

5. While the human rights framework does not prescribe the concrete measures for the realization of human rights, it does set important parameters. When comparing water and sanitation with the realization of other socio-economic rights, different models of financing become apparent. Some countries use public funding for health care systems, while systems in other countries rely on individual contributions. The realization of the human right to food usually relies on individual sourcing to a significant extent, while the human rights framework requires States to provide assistance to individuals who need it, and States may fix pricing for essential foodstuffs, to ensure that these remain affordable for all. For the realization of the right to education, the International Covenant on Economic, Social and Cultural Rights specifically requires States to ensure that primary education is free to all and to progressively introduce free education for secondary and higher education, hence relying on public financing for education. The realization of the human rights to water and sanitation is most likely to rely on a mix of sources of financing. From an environmental perspective, charging for the use of water is one means of discouraging wasteful consumption. On the other hand, the public health dimension of water and sanitation suggests a significant role for public financing. Sanitation, in particular, not only affects the

individual's right to access a toilet or latrine, but also other people's human rights, including the right to health (see the Special Rapporteur's reports on sanitation (A/HRC/12/24), paras. 23-29, and on wastewater (A/68/264). The State therefore has a significant role to play in ensuring that the necessary funding is available for service provision, and for using public financing where services would otherwise be unaffordable.

6. The human rights framework does not, however, rule out tariffs and user contributions for water and sanitation provision. Water and sanitation do not necessarily have to be available free of charge. The human rights framework recognizes that revenues have to be raised in order to ensure universal access to services. If everyone obtained water and sanitation free of charge, that could actually harm low-income households by depriving governments and service providers of the revenue needed to expand and maintain the service, posing a risk to the overall economic sustainability of the system or to the State's capacity to protect and fulfil other human rights. Moreover, where a policy provides free water distributed through utility networks, this tends only to benefit those who have access to a formal water supply. As the majority of poor and marginalized individuals and groups in developing countries do not enjoy access to a formal water supply, they will not be able to access free water provided by utilities. From a human rights perspective, public funds need to be directed towards extension of services for the most disadvantaged and for ensuring that such services are affordable.

7. Where people face an inability to pay, the human rights framework indeed requires free services that must be financed through sources other than user contributions. To ensure both affordability and financial sustainability, States must look beyond tariffs toward a broader system for financing water and sanitation services, including taxes and transfers, and cross-subsidization through public finance or tariff systems (see the Special Rapporteur's report on financing (A/66/255)).

8. The human rights to water and sanitation also have important implications as to how payment for services is raised. Human rights call for safeguards in the process of setting tariffs and determining subsidies, both in procedural and substantive terms, which include the human rights principles of transparency, access to information, participation and accountability. They oblige States to ensure that the cost of accessing water and sanitation is affordable and meets the needs of marginalized and vulnerable individuals and groups. The aim of ensuring financial sustainability at the macro level must never lead to situations in which individuals are unable to afford services. Affordability assessments must consider the totality of rights and the expenses people face to realize their human rights. This is all the more important in the context of austerity measures that have resulted in the significant overall burdening of people.[1] Particularly during times of economic and financial crises, decisions to introduce or raise tariffs need to be carefully considered. Where price rises happen concurrently with rising unemployment and social spending reductions, they leave many unable to afford essential services.

9. Deciding on the most effective system to ensure affordability will often require focused studies that examine all of the above variables, from assessing the types of services to which individuals have access, to considering how public financing can be used most efficiently. In an attempt to improve affordability of service provision in France, as part of the Economic Commission for Europe (ECE) Protocol on Water and Health, France is

[1] See European Parliament, Directorate-General for Internal Policies, "The Impact of the Crisis on Fundamental Rights across Member States of the EU - Country Report on Ireland," 2015, available at http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2015)510016, p. 65.

carrying out a study using a range of different tariff and subsidy systems to determine how affordability can best be assured.[2]

10. Discussions on affordability often focus on tariffs in the context of networked supply. While there are important challenges, this ignores that many people living in disadvantaged areas and within marginalized communities do not benefit from public networks, but rely on on-site or communal, often informal, sanitation and water solutions. It has been estimated that up to 25 per cent of the urban population of Latin America and almost 50 per cent of the urban population in Africa relies on small-scale informal providers to some extent.[3]

11. In many instances, these communities pay high prices for low-quality services – adding another layer of complexity to discussions on affordability. As informal service providers by definition tend not to be regulated for quality or affordability, they charge prices determined by what the market will bear or by price-fixing between providers (including cartel-like structures). For people in disadvantaged communities, paying for formal service provision is often a welcome opportunity to have a more regular and better-quality service, often at a lower price. These dimensions need to move centre stage in the discussion on finding solutions for ensuring affordable service provision for all.

12. Against this background, the present report presents an overview of the various costs that individuals and households must pay for water, sanitation and hygiene. It seeks to define affordability from the perspective of human rights and discusses the importance of setting concrete standards to determine affordability. It puts affordability in the broader context of ensuring environmental and economic sustainability, and discusses the impact of disconnections as a result of inability to pay. The report discusses who benefits from public financing in current practice, and then considers a variety of different mechanisms to ensure affordability of services for all through public financing and devising appropriate tariff schemes, including their advantages and challenges. Finally, the report discusses the importance of regulating and monitoring affordability before providing conclusions and recommendations.

II. Costs associated with water, sanitation and hygiene

13. This section considers the various costs associated with water, sanitation and hygiene, not only direct costs, but also time costs, as well as the additional burdens that corrupt practices and inadequate governance may cause. It concludes by considering the costs of inaction.

A. Different types of costs

14. In order to assess and ensure affordability, States need to look into the overall cost of delivering service that can have implications to the user's payments. These include not only those regularly occurring costs such as operation and maintenance, but also the entire "life-cycle" costs of services, which include construction and rehabilitation (where

[2] Ministry of Ecology, Sustainable Development and Energy – France, "Expert group on equitable access to water and sanitation", 2015, available from http://www.unece.org/fileadmin/DAM/env/documents/2015/WAT/05May_11-12_Paris/Meunier_FranceMEDD_ExperimentationSocialTariffs.pdf.

[3] Laura Sima and Menachem Elimelech, "The informal small-scale water services in developing countries", in *Water and sanitation-related diseases and the environment: Challenges, interventions, and preventive measures*, Janine M. H. Selendy (ed.) (Wiley-Blackwell, 2011), p. 231.

necessary). This life-cycle cost is particularly relevant for sanitation, considering the management of wastes. Once the costs for service delivery have been estimated, a different discussion is how to recover them. This can include a variety of sources, from tariffs to external public financing and, more important to the aim of this report, how to share the revenues from different users. On this last point, affordability needs to be a key consideration in order to avoid excessively compromising the expenses of people living in poverty.

15. For water, costs range from construction, operation and maintenance, in the case of networked provision, to costs of construction and maintenance of on-site solutions such as wells or boreholes. Connection charges are often a significant barrier for those living in extreme poverty. Household contributions for water services in rural areas and in informal settlements can differ quite substantially from household contributions for piped water provision. Beyond the option of buying water from public or private suppliers, individuals may need to cover the costs of the construction, operation and maintenance of communal or individual household provision (such as a rainwater cistern[4]), the cost of purchasing containers to store water, and the treatment of water. Even where water is safe at the source, by the time it has been transported and stored for future use, there is a high risk that it will become contaminated, which leads to extra costs for household water treatment.

16. In relation to sanitation, associated costs for households range from construction of the toilet within the home and tariffs in the case of networked provision, to costs of on-site solutions such as the construction or maintenance of pit latrines and septic tanks. On-site technologies generally require regular cleaning and maintenance, including the emptying of pits or septic tanks, and the proper management and disposal or re-use of wastewater and excreta. Sanitation systems that require water for flushing, such as sewerage systems, will generally imply extra costs for the water needed for flushing toilets.

17. While often overlooked, the use of hygiene facilities and services also has costs. The main expenses, other than installation of a handwashing station, are for water and soap for handwashing and personal hygiene, for water and cleaning products for domestic and food hygiene, and for sanitary napkins or other products for menstrual hygiene management.

18. In addition to material costs of service provision, the time spent on collecting water and accessing sanitation facilities outside the home must also be valued. As women and girls are largely responsible for collecting water, maintaining and cleaning sanitation facilities, and for ensuring the hygienic management of the household, these time costs have an important gender equality dimension.

B. Costs of corruption

19. Studies have shown that corruption within the water sector is common.[5] Even where services are nominally affordable to people, corruption may increase the cost of accessing services above official pricing. There may be a lack of transparency in decisions relating to

[4] On rainwater harvesting, see Uende A. F. Gomes, Léo Heller and João L. Pena, "A National Program for Large Scale Rainwater Harvesting: An Individual or Public Responsibility?" *Water Resources Management*, vol. 26, issue 9 (2012), pp. 2703-2714.

[5] United Nations Development Programme (UNDP), *Human Development Report 2006: Beyond scarcity: power, poverty and the global water crisis* (New York, 2006); Transparency International, Dieter Zinnbauer and Rebecca Dobson (eds.), *Global corruption report 2008: Corruption in the water sector* (Cambridge University Press, Cambridge, 2008); J. Davis, "Corruption in public service delivery: experience from South Asia's water and sanitation sector", *World Development*, vol. 32, No.1 (2004), pp. 53–71.

the choice of technology or service provider, which can result in inappropriate – often more costly – choices being made. Corruption also affects prices directly when bribes have to be paid for repair work, connection or reconnection. On a larger scale, there can be corruption within tendering processes for the delivery of services. Corruption tends to disproportionately affect poor and disadvantaged individuals and groups, as they lack the necessary power to oppose the vested interests of elites, and do not have the necessary resources to pay bribes.[6]

20. Limiting corruption requires focused efforts by States, regulatory bodies and service providers. Introducing a strong legal structure based on human rights can provide for anti-corruption measures such as strengthening transparency and accountability mechanisms.[7] For instance, one city in South-east Asia recognized the importance of addressing corrupt practices in order to increase access to water and sanitation for the poor, and instituted specific measures, including focused training for employees, the establishment of public offices so that customers could pay their bills directly rather than going through bill collectors, and the introduction of meters for all connections.[8]

C. The cost of poor governance

21. Poorly managed service provision can also have a significant impact on the cost of service provision. States must work to ensure that the right incentives are in place such that providers improve the management of water and sanitation services, including through appropriate organizational structure, optimized running costs, efficient service delivery (e.g. low water losses), among other measures. It also includes strengthening the human rights principles of participation, access to information and accountability in governance structures and decision-making processes.[9] Further, where the provision of services is intended to provide profits for the provider or shareholders (whether publicly or privately owned), this imperative to extract profits can also increase costs for the user beyond levels of affordability, and prevent the company from reinvesting in the service (see Special Rapporteur's mission report for Brazil (2014), A/HRC/27/55/Add.1, para. 68).

D. The price of inaction

22. The costs of ensuring access to water and sanitation may be high. Yet, the price of not investing is even higher. The lack of access to safe water, sanitation and hygiene underlies severe human costs such as poor health and high mortality rates, as well as major economic losses – globally, an estimated $ 260 billion is lost yearly due to lack of access to sanitation alone.[10] In developed nations, advances in life expectancy and child mortality accompanied economic growth only after governments began making substantial investments in water supply and, more importantly, sanitation.[11]

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[6] See Transparency International, *Global corruption report 2008* (footnote 5 above), p. 6.

[7] Ibid.

[8] Ibid, p. 48.

[9] WaterAid, *Reforming public utilities to meet the Water and Sanitation MDG* (2006), pp.5-7.

[10] World Bank, "WB Confronts US$260 Billion a Year in Global Economic Losses from Lack of Sanitation", 19 April 2013, available from http://www.worldbank.org/en/news/press-release/2013/04/19/wb-confronts-us-260-billion-a-year-in-global-economic-losses-from-lack-of-sanitation.

[11] UNDP, *Human Development Report 2006* (footnote 5 above), pp. 28-31.

23. Studies have shown evidence of a positive cost-benefit ratio. One analysis estimated that for each dollar invested in achieving universal access to basic drinking water at home, the average return is $4. For universal access to basic sanitation at home, the estimated benefit is $3, while the return on eliminating open defecation in rural areas is $6 per dollar spent.[12] The safe management and treatment of wastewater has received less attention in cost-benefit analyses. While requiring large initial investments, in the long term the price of inaction is far greater than the cost of ensuring adequate wastewater management. Studies on the economic returns of sanitation interventions show that both septic tanks with treatment as well as sewerage networks with treatment have a positive cost-benefit ratio, for instance about 1:4 in the Philippines[13] and about 1:3 in Vietnam.[14]

24. Although sometimes monetized in economic analyses, interventions provide some intangible benefits related to time saved, dignity gained and diseases and deaths prevented. The particularly positive impact for women and girls of investing in water and sanitation is crucial for achieving gender equality. Environmental benefits are also significant, given that improving water and sanitation services helps combat contamination and environmental degradation.

III. Understanding affordability

A. Defining affordability and setting standards

25. Affordability, as a human rights criterion, requires that the use of water, sanitation and hygiene facilities and services is accessible at a price that is affordable to all people. Paying for these services must not limit people's capacity to acquire other basic goods and services guaranteed by human rights, such as food, housing, health, clothing and education. Affordability standards must be considered together with standards of an adequate quantity and quality of water and sanitation to ensure that human rights standards are met.

26. Affordability provisions in water and sanitation laws are quite common. For instance, in Namibia, the Water Resources Management Act requires ensuring "that all Namibians are provided with an affordable and a reliable water supply that is adequate for basic human needs".[15] In many instances, the challenge is to translate general provisions into concrete affordability standards. Such standards are essential to ensure that tariffs are set in a way that is affordable to people and to ensure accountability. Generally, people are prepared to pay a high price for water because it is essential for so many aspects of a person's life, but this does not justify a high affordability threshold. Willingness-to-pay studies therefore often deliver limited results in terms of people's actual capacity to pay.

27. A number of countries have set standards for affordability. For instance, a regulation in Indonesia explains that "Tariff shall meet the principle of affordability... if domestic expense on the fulfilment of the standard of basic need for drinking water does not exceed

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[12] Guy Hutton, Laurence Haller and Jamie Bartram, "Global cost-benefit analysis of water supply and sanitation interventions", *Journal of Water and Health* (5 April 2007), pp.481-502.

[13] World Bank, Water and Sanitation Program, "The Economic Returns of Sanitation Interventions in the Philippines", Research Brief (Jakarta, 2011), p. 4.

[14] World Bank, Water and Sanitation Program, "The Economic Returns of Sanitation Interventions in Vietnam", Research Brief (August 2011). Available from http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2011/10/05/000020953_20111005094020/Rendered/PDF/647750wsp0viet00Box361544B00PUBLIC0.pdf.

[15] Namibia, Water Resources Management Act No. 24 2004, article 26.1.

4% (four per cent) of the income of subscribers".[16] For some households, however, even a small proportion of their expenditure will be too much, and water and sanitation must be available for free in these instances.

28. It is impossible to set a generally applicable affordability standard at the global level. Any such standard would be arbitrary and cannot reflect the challenges people face in practice and the context in which they live, including how much they need to spend on housing, food and the realization of other human rights. The affordability of water and sanitation services is highly contextual, and States should therefore determine affordability standards at the national and/or local level. The human rights framework stipulates important parameters for the process of doing so, in particular in terms of participation.[17]

B. Reconciling affordability with environmental and economic sustainability

29. When seeking to ensure affordability in practice, measures to implement human rights often need to be reconciled with broader considerations of ensuring environmental and economic sustainability. "Social sustainability" in the form of affordable access must not be jeopardized in favour of measures that aim to secure economic and environmental sustainability. To be environmentally sustainable, there must be sufficient water resources of good quality available to serve existing and future users. Water tariffs should be designed to allow for access to sufficient water for essential purposes but, where necessary, to limit use for luxuries. Water resources must be protected from pollution, which means that sanitation services must include appropriate collection, transport, treatment and disposal of wastewater to protect both public health and the environment. However, sanitation tariffs must not be so high that people avoid using the service, which could put a strain on public health.

30. To ensure economic sustainability, some have argued for full cost recovery through tariffs, i.e. for water and sanitation service providers to charge full operational costs (and in some cases also construction and rehabilitation) to existing and future users. Where there are sufficient numbers of well-off people compared to those who are unable to pay the full cost of a service, full-cost recovery may be possible, with some cross-subsidization between the former and the latter. However, even in countries with a relatively well-off population, for sanitation services in particular, governments frequently provide significant amounts of public funding in order to make the service financially viable and to protect public health.[18]

31. In many developing countries, there are insufficient numbers of people who are well-off to provide a cross-subsidy. In these situations, full cost recovery only through tariffs will not be a feasible option. Public finance may be needed in such instances to ensure affordability for all households. To make such financing available and achieve affordability for all, as a first step States should make better use of budgets already allocated for water and sanitation, specifically to reduce inequalities in access to services.

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[16] Indonesia Minister of Home Affairs, "Technical guidance and procedures for regulating tariff of drinking water in regional administration-owned drinking companies", regulation No 23/2006, 3 July 2006, Article 3.2, available from http://faolex.fao.org/docs/pdf/ins67962.pdf.

[17] For interesting insights of participatory process to decide on their own poverty lines, see Asian Coalition for Housing Rights, "Housing by People in Asia" No. 19, September 2014, available from http://www.achr.net/upload/downloads/file_16102014142111.pdf.

[18] International Water and Sanitation Centre report 2015, available from http://www.publicfinanceforwash.com.

C. Disconnections as a result of unaffordable services

32. The affordability of water and sanitation services and disconnections are inextricably linked, as in many instances the failure to pay for services leads to disconnection.

33. Disconnection of services due to an inability to pay for the service is a retrogressive measure and constitutes a violation of the human rights to water and sanitation (Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2002) (E/C.12/2002/11), para. 44a). Disconnections are only permissible if it can be shown that households are able to pay but are not paying. The South African 1997 Water Services Act states that disconnections may not result in a lack of access to services for non-payment where the individual is unable to pay for basic services.[19] More recently, France adopted the Brottes Law, which prohibits disconnections for inability to pay.[20]

34. In some instances, disconnections have taken place on a large scale. For instance, the Detroit Water and Sewerage Department has been disconnecting water services with no consideration of whether people are able to pay or not. This led the former Special Rapporteur to state, "when there is genuine inability to pay, human rights simply forbids disconnections", and to demand the residents' immediate reconnection.[21]

35. Pre-paid water meters are suggested as an option for service providers to ensure that households and individuals pay for the water that they use, as they require payment in advance.[22] This may lead to "silent disconnections" due to lack of ability to pay, and can be a violation of the human rights to water and sanitation. Therefore, plans to use pre-paid meters must be carefully examined before they are installed. Some pre-paid water meters will allow for access to a limited quantity of water even where the individual or household has not paid. The quantity, continuity and quality of water would need to be carefully assessed for human rights compliance.

IV. Mechanisms for ensuring affordability in practice

36. To ensure affordability for all and a sustainable system, States must develop appropriate pricing, tariff and subsidy structures. In the following section, the report explores how public financing is allocated, and who is likely to benefit from this. The report then seeks to discuss how financing mechanisms can be used to effectively target those groups who rely on these mechanisms to ensure the affordability of services.

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[19] South Africa, Water Services Act, art. 4 (3)(c).

[20] France, Loi n° 2013-312 (15/04/2013), art. 19, which modifies the Code de l'action sociale et des familles, art. L115-3, available from http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000027310001&fastPos=1&fastReqId=760965938&categorieLien=cid&oldAction=rechTexte (in French).

[21] Press statement by the Special Rapporteur on the human right to safe drinking water and sanitation and others, "Detroit: Disconnecting water from people who cannot pay – an affront to human rights, say UN experts", 25 June 2014, available from http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14777.

[22] Coalition Against Water Privatisation, "The struggle against silent disconnections – Prepaid meters and the struggle for life in Phiri, Soweto" (2004), pp. 4-5, available from https://www.citizen.org/documents/Phiri.pdf.

A. Public finance for water, sanitation and hygiene: Who benefits and who does not?

37. Almost all large-scale water and sanitation systems receive some level of public financing. For sanitation in particular, while it has long been known that the costs of not having access far exceed the actual cost of providing access, it has been hoped that private sector participation would be sufficient to improve access to sanitation. However, more recently, research by the World Bank and others is beginning to show that it is unrealistic for the private sector to fill the service gap alone.[23] States must be the driving force in investments in sanitation, in particular to cover the costs of constructing and maintaining infrastructure, and in some cases also for operation, for example where pit-emptying is prohibitively expensive.

38. In many instances, however, public financing is unequally distributed. Middle-class households often benefit from subsidies, both direct subsidies and "hidden" subsidies. Direct subsidies include tax breaks or financial incentives for constructing a toilet, which, when poorly targeted tend to benefit middle-income families. Subsidies are "hidden" when public financing is used to construct infrastructure and services that are intended to be used by all, but in fact are only available to middle- and high-income households.

1. Public finance for networked provision

39. Public finance is very common in large-scale piped water and sewerage systems, with governments (and other funders, such as multilateral and bilateral donors) investing significantly in networks, water treatment plants, wastewater treatment plants and trunk sewers. Provided that all households within a city are able to connect to use these services, this may be an efficient approach to ensuring that public finances are used well for water and sanitation service provision, even if it also results in subsidizing service provision for those who would not need such support to ensure affordability.

40. In the majority of developing countries, piped water and sewerage systems are accessible only to a minority of those living in urban areas – and to very few of those living in rural areas.[24] Focusing public finance on networked provision thus disproportionately benefits comparatively better-off households, unless specific action is taken to extend networked provision to all residents.

41. Public finance may also be provided for the maintenance and extension of water and sanitation services and facilities, including for connection charges. Where extensions are expected to reach all households, they can be an appropriate form of providing support to low-income households, as they will ensure more affordable and regular charges for water and sanitation than charges of informal provision.

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[23] World Bank, Keynote Speech at the 2014 Sanitation and Water for All High Level Meeting by Shanta Devarajan, Chief Economist, World Bank, April 11th 2014, available from http://sanitationandwaterforall.org/?download=663; Guy Norman, Catarina Fonseca and Sophie Trémolet (2015), "Domestic public finance for WASH: what, why, how?" *Finance Brief 1*, Public Finance for WASH, available from http://www.publicfinanceforwash.com/sites/default/files/uploads/Finance_Brief_1_-_Domestic_public_finance_for_WASH.pdf.

[24] World Health Organization (WHO)/United Nations Children's Fund, Joint Monitoring Programme, "Progress on Sanitation and Drinking Water 2015 Update and MDG Assessment" (Geneva, 2015), pp. 8-9.

2. Communities in informal settlements

42. Residents of informal settlements often do not enjoy formal service provision, receiving their services from a range of different, often informal and/or small-scale providers or through self-supply. For water services, this can include water kiosks, water vendors that come to a user's home, as well as piped water delivered to the household. For sanitation, there is an even larger range of types of service, from no service at all through substandard pit latrines (seldom emptied and often overflowing) to shared or community-level toilets, to connections to a rudimentary sewage system, where wastes are not treated, to small-scale sewage systems with adequate treatment plants. Given this range of services that exists outside the formal system, any pricing, subsidy or tariff system can seem irrelevant to an often substantial part of the population. In many cities, tariff structures, subsidy systems or other special measures are only accessible for households with a formal address or to a registered household or individual.

3. Communities relying on self-supply

43. Local governments often lack the capacity to support sustainable access to water and sanitation services, in particular in rural areas. As a result, donors and local governments have often turned to promoting community management approaches. Unfortunately, there continues to be a high rate of failure under community management. One study estimated that an average of 30 per cent of rural hand pumps in sub-Saharan Africa are not working, with the figure rising to as high as 65 per cent in some countries.[25] Explanations for these situations include a lack of local technical skills, management capacity, spare parts, or funds to pay for the necessary repairs. Further, as people are understandably unwilling to pay for services that are unreliable, there is inadequate funding for repairs. Institutional reform, developing communities' capacity, and increased financial and human resources are therefore required to realize the human rights to water and sanitation in rural areas.[26]

44. On the other hand, significant inroads have been made through Community-Led Total Sanitation in expanding access to sanitation. Recognizing that improving sanitation relies to a large extent on practicing safe and hygienic sanitation, the approach focuses on mobilizing communities to analyse and improve the situation with regard to open defecation.[27] Community-Led Total Sanitation is in principle opposed to the provision of subsidies based on the premise that subsidized sanitation often does not align with people's preferences and that such solutions have often been unsustainable by creating a culture of dependency.[28]

45. The approach, or its implementation in particular cases, has encountered some criticism from the perspective of human rights,[29] including concerns about the affordability of adequate sanitation for the most disadvantaged due to the lack of subsidies. Without external support, people living in extreme poverty may only be able to build very basic

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[25] Tom Slaymaker and Catarina Fonseca, "Framing paper JMP post-2015 Working Group on Water" (2012), available from http://www.wssinfo.org/fileadmin/user_upload/resources/post-2015-Water-Working-Group-Framing-Paper-v3.pdf.

[26] See Organization for Economic Cooperation and Development/Development Co-operation Directorate Secretariat and World Water Council, Donor profiles on aid to water supply (2008), available from http://www.oecd.org/dac/stats/41752319.pdf.

[27] See Kamal Kar and Robert Chambers, *Handbook on Community-Led Total Sanitation*, (Plan UK and Institute of Development Studies, London and Brighton, 2008), p. 7.

[28] Ibid, p. 8.

[29] See Jamie Bartram and others, "Commentary on the Human Right to Sanitation: Should the Right to Community-wide Health be won at the Cost of Individual Rights?" *Journal of Water and Health*, vol. 10, No. 4 (2012), pp. 499-503.

latrines and do not always have the means to afford maintenance and improvements.[30] Some variants of Community-Led Total Sanitation are open to using external subsidies for the most disadvantaged in communities. Some suggest a sequencing approach to the use of public finance. While the initial investments in hardware are expected to be made by the community, public finance should be used in the long term to create the enabling environment for sustainable sanitation and ensuring public health, for instance for maintenance and pit emptying, or through public health interventions that promote sanitation and good hygiene practices.[31] Some schemes have provided microfinance for the construction of latrines, which is then paid off over a two- or three-year time frame. This can be an effective way of spreading the cost, but affordability concerns will remain for the poorest households.

46. More generally, Community-Led Total Sanitation encourages community support and assistance from better-off households to people living in greater poverty. Yet many communities are not a coherent whole: there are entrenched power asymmetries and inequalities. People not only experience different levels of poverty and deprivation, but may be marginalized on grounds of ethnicity, caste or other factors. There may be instances where community support is not forthcoming. In other instances, people may feel that they have to rely on the charitable benevolence of others rather than feel entitled to the realization of their right to sanitation.

47. In such instances, as in other contexts of self-supply, the human rights framework stresses that States have an obligation to support people in the realization of their human right to water and sanitation, where needed with financial assistance. States may not absolve themselves of their human rights obligations by relegating responsibilities to communities.[32] What must be ensured is that sanitation and water services are affordable to even the most disadvantaged member of a community.

B. Ensuring that public financing benefits the most disadvantaged

48. The current reality is that public financing for water and sanitation largely benefits better-off parts of society. Public finance is largely used for large-scale infrastructure in urban areas, which is enjoyed predominantly by middle- and high-income households.

49. The first step to ensuring that public financing is targeted toward the most disadvantaged is to acknowledge the inherent inequalities and biases in the current distribution of public financing. On that basis, States must adopt measures to reach the people who rely on public finance to ensure the affordability of water and sanitation services for all and to reduce inequalities in access. States need to reallocate resources to the most disadvantaged. Reallocating current public resources may mean extending access for all to citywide systems in urban areas or shifting from high-cost interventions that serve

[30] Mary Galvin, "Talking shit: is Community-Led Total Sanitation a radical and revolutionary approach to sanitation?" *Wiley Interdisciplinary Reviews: Water*, vol. 2, issue 1 (January/February 2015), pp. 9-20.

[31] For instance, see Global Sanitation Fund, *Progress Report 2014*, p. 4, available from http://www.wsscc.org/sites/default/files/publications/global_sanitation_fund_progress_report_2014_web.pdf.

[32] See the Special Rapporteur's report on financing (A/66/255), para. 53; see also Galvin, "Talking shit" (footnote 30 above), p. 17.

limited numbers of people to low-cost interventions that provide services to more people, particularly those who most need assistance.[13]

50. One option is seeking to develop truly universal systems that include everyone. Any such universal system for distributing public finance would include people who do not need such funding to access services. This raises questions in terms of the most appropriate use of available resources. Yet this needs to be carefully balanced against the risk of being under-inclusive and leaving out parts of populations that do rely on subsidies to ensure the affordability of services. Any type of targeting risks not reaching the people who are most in need. As a general principle, from the perspective of human rights, unintended exclusion is far more serious than unintended inclusion.

51. Research suggests that some governments have succeeded in effectively using public funding for increasing access to sanitation. For instance, Thailand achieved nearly universal access to sanitation in the late 1990s due to sustained funding over decades based on a comprehensive programme. The Government has provided subsidies through revolving funds as well as funding for specific activities, with villages having flexibility in allocating funds to those most in need.[14]

52. Recent projects in Dar es Salaam (United Republic of Tanzania), Blantyre (Malawi), Chinhoyi (Zimbabwe) and Kitwe (Zambia) driven by slum or shack dweller federations seek to develop citywide sanitation provision in situations where households can only afford $3-$4 per month. They look into choices for low-income households, loan financing and the crucial role of engagement with local authorities from the outset.[15]

53. Where States choose to adopt universal systems for subsidizing service provision, they need to ensure that these are truly universal rather than reaching only as far as networked provision does. Financing for universal access, and indeed the universal realization of human rights, does not necessarily require one universal system. On the contrary, in many countries it will mean additional approaches that are targeted to reach people beyond utility networks.

C. Challenges in targeting

54. Where States adopt targeted measures, this also poses challenges. In practice, unfortunately, such measures often fail to reach the target population for a variety of reasons, including:

(a) Target groups are not informed of the availability of subsidies or financial support;

(b) There is excessive paperwork or a requirement for specific pieces of documentation that low-income or marginalized people may not have;

(c) The target groups are not involved in the design of the mechanism;

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[13] See Kavita Wankhade, "Urban sanitation in India: key shifts in the national policy frame", *Environment and Urbanization*, vol. 27, No. 2 (2015), pp. 1-18.

[14] WaterAid and Sanitation and Hygiene Applied Research for Equity, "Evaluating the effectiveness of public finance for sanitation: A synthesis report", 2013, pp. 6-7, available from http://www.wateraid.org/what-we-do/our-approach/research-and-publications/view-publication?id=a2a29c88-b69b-46b0-8578-b0fb80ac6ae6.

[15] Evans Banana and others, "Sharing reflections on inclusive sanitation", *Environment & Urbanization* vol. 27(1) (2015), pp. 19–34.

(d) In most countries where subsidies are applied through tariff systems, these are only available to people connected to networks, thus excluding those who rely on kiosks, standpipes or public toilets;

(e) Often, due to an increasing block tariff structure, consumption subsidies do not benefit large families or multiple households sharing one water connection;

(f) Public financing is available only to those who have secure land tenure, thus excluding those living outside the formal legal system;

(g) Those who are responsible for allocating public funding engage in corrupt practices;

(h) Those who are connected to water supply services but not to sewerage networks are often disadvantaged by cross-subsidies between water and sanitation services. This subsidy results in persons who have a water connection but no sewerage connection subsidizing better-off people or households that have such a connection;

(i) In many instances, subsidies for water are targeted towards commercial or industrial users. Where such subsidies benefit users that do not actually rely on them for their livelihoods, they should be eliminated or reduced to free up resources for the benefit of the population in need.

55. In all cases, it is critical that any sort of public financing is transparent, clearly explained and widely promoted to ensure that those entitled to it receive it, to reduce the scope of corruption, and to analyse whether the mechanism has been effective.

D. Subsidies based on income, geographic location and types of access

56. In different contexts, different mechanisms have been used with the aim of targeting financial support at those individuals and groups who rely on it to ensure the affordability of services. Subsidies could apply to low-income households, to areas populated predominantly by low-income communities, or to small-scale services likely to be used by those living in poverty or on a low-income.

57. Targeted subsidies can be provided at the household level based on income. In many cultures, however, there is significant stigma attached to the receipt of subsidies, in particular where the application for the subsidy becomes publicly known. In a country in Africa, for example, there are subsidies available for a range of social services, but many people choose not to register even where they are eligible reportedly due to the stigma attached. One way to overcome such stigmatization would be to adopt ways of distributing subsidies that do not publicly expose people. Beyond this, however, broader cultural changes are needed in the perception of subsidies to overcome the often internalized shame and stigma of relying on public subsidies.

58. Targeting schemes that are based on levels of household income or expenditure may be costly, requiring administratively labour-intensive surveys to assess who is eligible, except when this is available information for other administrative needs such as taxes. Targeting is especially difficult where there is a large informal economy. More generally, such targeting is often imprecise. Even sophisticated social security systems can exclude significant numbers of the poorest residents, particularly those living in rural areas, where it may be difficult to keep people informed of their entitlements.

59. In some cases, household income or expenditure data is not available. In such cases, other indicators such as the type of access (for example, whether a small-scale facility is used), property value, size of the residence or geographical location can be used to evaluate the economic capacity of users.

60. While being easier and cheaper to administer, they have the drawback of not always being able to differentiate between people living in poverty, who may be able to pay a small amount, and people living in extreme poverty, who cannot afford to pay more than a nominal sum or anything at all. In many instances, it may be useful to utilize a mixture of mechanisms. For example, a comparison of schemes of subsidies in Chile (based on household means) and in Colombia (based on categories of socio-economic status and socio-geographic context) suggests that means-tested subsidies are more effective at identifying poor households than geographically targeted schemes.[36] For example, it may be beneficial to provide subsidies automatically in low-income areas, but to permit people outside such areas to apply for subsidies on the basis of their low income. Moreover where an income supplement is provided, households that are not connected to a network, including those living in rural areas, could also be eligible.

E. Social protection floors

61. A broader mechanism for achieving access to water and sanitation services for people living in poverty is to put in place "social protection floors". These are nationally defined basic social security guarantees that ensure access to essential services, including water and sanitation, as well as providing basic income security to those in need.[37] Human Rights Council resolution 28/12 of 9 April 2015 acknowledged "that social protection floors may facilitate the enjoyment of human rights… safe drinking water and sanitation, in accordance with the human rights obligations of States" and encouraged "States to put in place social protection floors as part of comprehensive social protection systems" (A/HRC/RES/28/12, paras. 6 and 8). Social protection floors can be particularly relevant for achieving gender equality and protecting marginalized or disadvantaged individuals and groups. At the national level, for instance, Cambodia has made support for sanitation and water in times of emergency and crisis a key intervention under the National Social Protection Strategy for the Poor and Vulnerable.[38] In Mexico, the federal budget for social spending, which contributes to building a social protection floor, includes water supply and sewerage.[39]

F. Ensuring affordability through tariff schemes

62. Other types of mechanisms to ensure the affordability of services can be built into tariff schemes. Different tariff systems have different potentials but also limitations to ensure the affordability of services. These are generally only relevant to those connected to piped water and sewerage systems.

1. Flat rate

63. Flat rates are commonly used where meters are not installed, where a charge based on a certain volume of water used or sewage discharged would be impossible to implement. Some countries use property taxes as the basis for charging unrelated to consumption. Differentiated flat rates could be used that rise or fall depending on such criteria as

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[36] Andrés Gómez-Lobo and Dante Contreras, "Water subsidy policies: a comparison of the Chilean and Colombian schemes", *The World Bank Economic Review*, vol. 17, No. 3 (2003), pp. 391-407.

[37] International Labour Organization (ILO), "Social Protection Floors Recommendation" recommendation No. 202, 2012.

[38] UNDP and ILO, *Sharing Innovative Experiences, Successful Social Protection Floor Experiences* (2011), p. 125.

[39] Ibid., p. 299.

household size, income and property value, among others, with care taken that marginalized and vulnerable individuals and groups are not being charged an unaffordable rate.

2. Uniform volumetric tariff

64. Uniform tariff approaches depend on a metered system, where households pay a fixed rate for each unit that they use. Such systems will generally be cheaper to administer than a differentiated system. However, they do not take account of households' size or ability to pay, or whether a household has particular needs that will require more water, such as dialysis or other health needs. They will almost invariably lead to better-off households having access to more water or paying lower bills than poorer residents. Where poorer households access larger quantities of water to meet their requirements, services may become unaffordable without additional safeguards.

3. Differential pricing

65. Differentiated tariffs, which intend to provide a lower tariff targeted at poorer households or communities, may be more complex to administer but may help to ensure affordability even for disadvantaged households. Yet, difficulties remain in ensuring that they actually reach the target groups. In the United States, several municipalities have adopted differential pricing with the aim of higher-income households subsidizing lower-income households. Recently, the Philadelphia City Council passed legislation to establish a low-income programme to ensure that water bills are affordable in relation to income. To ensure that residents are aware of the programme, the bill places an affirmative obligation on the city to refer them to the programme.

66. Increasing block tariffs is a common model for differential pricing in which differing quantities of water (or sewage) are charged at different rates. The first "block" may be set at a "lifeline" tariff – a sufficient quantity for the average household – at a low rate, generally below the cost of providing the service. Once this first "block" has been used, there is an increase in price so that households using water beyond their basic domestic and personal needs will pay comparatively more.

67. To ensure affordability for all households, it is imperative that the blocks are set appropriately. If the first block is too small, or the tariff is too high, poor families will not be able to afford to buy sufficient quantities of water. However, if the first block is too large, or the tariff too low, then people who do not actually need the lowest rate will benefit, which may put the overall financial sustainability of the system at risk.

68. One problem with this system is that often poorer households have more household members or share their connection with other households, and will therefore reach the maximum quantity for the "lifeline" tariff, and be forced to pay a higher rate, as is the case in Jordan (see Special Rapporteur's report, mission to Jordan (A/HRC/27/55/Add.2), para. 24). In Portugal, the regulator has therefore proposed that municipalities and providers ensure a particular tariff for people living in larger households,[40] as has Los Angeles.[41]

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[40] Water and Waste Services Regulation Authority (Portugal) Recommendation No. 01/2009 "Tariff formation for end-users of drinking water supply, urban wastewater and municipal waste management services" ("Tariff Guidelines"), para. 1.2, available from http://www.ersar.pt/Website_en/ViewContent.aspx?SubFolderPath=%5CRoot%5CContents%5CSiteEN%5CMenu_Main%5CDocumentation%5CERSAR_OtherDocuments&Section=Menu_Main&BookTypeID=5&FolderPath=%5CRoot%5CContents%5CSiteEN%5CMenu_Main%5CDocumentation&BookCategoryID=2&BookID=2077.

69. A particular model, which can be part of increasing block tariffs, involves the provision of a first block free of charge. Cities and countries such as South Africa with the Free Basic Water Policy, some Colombian cities and the minimum provided by the Delhi Jal Board are examples of such policies. Still, the same challenges remain in terms of setting the amount of free water at the right volume to ensure the overall financial sustainability of the system. The key challenge is that households connected to the formal network are likely to benefit more from such policies than households relying on informal service provision. Even where utilities or municipal authorities provide for additional water services through truck deliveries in informal areas, huge disparities in terms of the quantity and accessibility of water remain.

70. Differential pricing can also be used for different sectors, for instance using higher tariffs for industrial, commercial and public users to cross-subsidize residential users. In practice, however, such cross-subsidization is often discouraged and agricultural and industrial water use may be highly subsidized. Where such public financing is not necessary to secure livelihoods and is not directly related to the realization of human rights, existing pricing and subsidy policies should be revised to use the maximum amount of available resources for the realization of human rights.

4. Connection charges

71. Charges to a household to connect to a service can be a barrier to gain access to an existing networked service. Some countries have decided to remove these charges for all or some households in order to reduce the barriers. The costs of extending the services are then financed by incorporating them into standard service charges. Historically, many countries have used surcharges on existing users to finance the extension of the network in rural areas. Removing the connection charge is particularly relevant for low-income households to gain access to a sewerage network, as the connection charge is often a significant barrier to affordable sanitation.

G. Participation

72. In determining mechanisms for allocating public financing and setting tariffs, participation, access to information and an active role in decision-making are essential. Such decisions translate into the prioritization of resource allocation. Most important from the perspective of human rights is that such participation includes the most marginalized and disadvantaged individuals and groups to ensure that measures are taken that actually reach the ones most in need of public financing. This relates to decisions at the national level concerning overall resource allocation as well as decisions at the local level, including on the prioritization between different parts of a municipality to ensure citywide service provision, including in informal settlements.

73. At a broader level, communities have used participatory wealth rankings as a way of assessing poverty to determine how to target measures within their communities. Determining relative poverty in a community allows for targeting on that basis. Such participatory processes can provide detailed insights on local poverty and often include access to water as an indicator in the analysis.[42]

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[41] Sonia F. Hoque and Dennis Wichelns, "State-of-the-art review: designing urban water tariffs to recover costs and promote wise use", *International Journal of Water Resources Development*, vol. 29, No. 3 (2013), pp. 472–491.

[42] See e.g. James Hargreaves and others, "'Hearing the Voices of the Poor': Assigning Poverty Lines on the Basis of Local Perceptions of Poverty. A Quantitative Analysis of Qualitative Data from

74. Participatory budgeting is increasingly common in municipalities across the world, enabling residents to agree on the budget priorities of local government. Such processes have often contributed to improving basic service provision, including water and sanitation.[43]

V. Regulation and monitoring

75. The discussion on ensuring affordability has repeatedly pointed out the crucial role of regulation and monitoring.

A. Regulating service provision for affordability

76. Ensuring the affordability of water and sanitation services requires an effective legal and policy framework, which includes a strong regulatory system. The International Water Association Lisbon Charter recognizes the importance of regulation, recommending that regulators "supervise tariff schemes to ensure they are fair, sustainable and fit for purpose; promoting efficiency and affordability".[44]

77. Once a tariff system that meets affordability standards has been developed, the body responsible for regulating service providers should be able to ensure both that the tariff system is correctly applied, and that it is having the desired impact on affordability levels for all users. Likewise, a regulatory body, in collaboration with the relevant government department, can ensure that public financing is adequately targeted. Complaints mechanisms, put into place by service providers or regulators, can support these processes.

78. Particular challenges arise for regulation in the context of small-scale and informal provision, as governments often do not have any control over the operation of these providers. Governments may formalize the informal sector while keeping the small-scale nature of the provision through effective regulation, such that the small-scale providers serve as contractors to the government. This is the strategy that is being initiated in Nairobi, Kenya, where water kiosks in informal settlements are supplied by and registered with the utility, and the tariff is fixed by the regulatory body. However, this tariff is not always complied with.[45] Where households rely on informal service provision, governments should also provide support in terms of management and technical support to increase the quality and affordability of their services. A similar approach is taken in Maputo, Mozambique, where the regulator supports informal service provision in the absence of the capacity of the utility, in the short-to-medium term, to deliver services to all residents.[46]

79. Above all, regulation of informal and small-scale service provision should assist in increasing access to water and sanitation for poor and marginalized households, and not

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Participatory Wealth Ranking in Rural South Africa", *World Development*, vol. 35, No. 2 (February 2007), pp. 212–229.

[43] Yves Cabannes, "Contribution of Participatory Budgeting to provision and management of basic services: Municipal practices and evidence from the field", *Environment and Urbanization*, vol. 27(1) (September 2014) pp. 257–284.

[44] International Water Association, *The Lisbon Charter: Guiding the Public Policy and Regulation of Drinking Water Supply, Sanitation and Wastewater Management Services*, art. 4.2.

[45] See "Statement by the United Nations Special Rapporteur on the human right to water and sanitation (Visit to Kenya, 22-28 July 2014)", available from http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14912&LangID=E.

[46] Catarina de Albuquerque, *Realising the human rights to water and sanitation: A handbook by the UN Special Rapporteur*, booklet 4 (Portugal, 2014), p. 49.

hinder such access. Formalization and regulation of informal service provision must pay due attention to the impact of this process on levels of access, affordability and quality of service provision. Where States seek to replace informal service provision with formal providers, they must ensure that people can actually afford these alternatives and do not experience retrogression in the realization of their human rights.

B. Monitoring affordability

80. Monitoring affordability is essential for assessing whether standards are being met, and whether people in fact have access to affordable services. Unless efforts are made to monitor whether services are affordable for all, States and service providers alike will struggle to provide appropriate support to individuals and households that may have difficulties in paying for services.

81. However, monitoring affordability is not a straightforward process. Accurate and meaningful monitoring of affordability is extremely complex. If carried out on the basis of an affordability standard, the necessary parameters for calculating affordability – the expenses for accessing water and sanitation in comparison to overall household expenditure, and the real income of a household – are difficult to measure. Monitoring whether a household's expenditure on water and sanitation exceeds a specific proportion of its income in a specific context is not easily done, given the precarious incomes of many low-income households, and the many different types of expenses for water and sanitation services in informal settlements, where affordability concerns are most acute. Given these difficulties, States often use an "average" or a "lowest" income level, and an assumed acceptable volume of water to set appropriate service charges. However, such generalizations hide whether individuals can actually afford services in their particular context, which may involve a large household, or individuals with specific health problems.

82. Other approaches to monitoring affordability take a different starting point. Rather than relying on an absolute affordability threshold, they look at the impact that the cost of water and sanitation services has on the enjoyment of other human rights. Human rights monitoring can greatly contribute to qualitative, more contextualized monitoring. For instance, treaty bodies can provide details on the impact of the lack of affordability on people's lives, including through disconnections, the challenges people face, and the interlinkages with the realization of other human rights.

83. The ECE Protocol on Water and Health has developed an Equitable Access Scorecard, which assists States to monitor whether services are affordable. This scorecard looks beyond the affordability of tariffs to other measures that Member States may employ to ensure affordability. This includes monitoring the inclusion of affordability concerns in water and sanitation policy, the affordability of self-provision, whether public funding is made available to address affordability concerns, how much public funding has actually been spent on affordability concerns, and whether social protection measures are effective in ensuring affordability.[47]

84. In terms of global monitoring, there are heightened challenges due to data gathering and comparability. The proposed goal 6.1 of the Sustainable Development Goals explicitly refers to achieving affordable drinking water for all, hence calling for including the criterion of affordability in global monitoring.

[47] ECE/WHO Protocol on Water and Health, Equitable Access Scorecard 2014, chapter 4, available from http://www.unece.org/?id=34032.

85. For households that receive water and sanitation through utilities, data is available through the International Benchmarking Network for Water and Sanitation Utilities, which includes data on water tariffs charged by a significant number of utilities.[48] Beyond such existing initiatives, a review of potential indicators demonstrates the complexity of monitoring affordability.[49] Determining and monitoring the costs of non-networked supply and including them into measures of affordability is particularly challenging, but essential from the perspective of human rights. Focusing solely on utility tariffs bears the risk of severely underestimating expenses and would paint an overly positive picture of affordability that only captures the better-off, while neglecting the very real challenges that the most disadvantaged people and communities face in accessing water and sanitation. This review shows that monitoring affordability in its complexity (including water, sanitation and hygiene access expenditure) is feasible, but would require a combination and analysis of data from different sources.[50] The Special Rapporteur encourages States and international organizations to explore these options further to ensure more comprehensive monitoring of the affordability of access to services.

VI. Conclusion and recommendations

86. **Affordability is key for the realization of the human rights to water and sanitation. Ensuring affordable service provision for all people requires a paradigm shift – starting from the perspective of human rights. Economic sustainability and affordability for all people are not impossible to reconcile, but human rights require rethinking current lines of argumentation and redesigning current instruments. The main challenge is to ensure that targeted measures and instruments do, in fact, reach the people who rely on them most. For instance, tariffs must be designed in such a way that the most disadvantaged of those connected to formal utilities receive the assistance they need. It also requires ensuring that public finance and subsidies reach the most marginalized and disadvantaged individuals and communities, who are often not (yet) connected to a formal network, who may live in informal settlements without any formal title or in remote rural areas where self-supply is common, and who are often overlooked or deliberately ignored in current policymaking and planning.**

87. **The Special Rapporteur offers the following recommendations. States should take the following measures:**

(a) Assess what financing mechanisms and subsidies are in place, including hidden subsidies, and who benefits from them;

(b) Ensure transparency about existing and planned financing mechanisms and subsidies;

(c) Consider establishing national legislation requiring that service providers and subnational governments include affordability concerns in policies and in service provision;

(d) Set affordability standards at the national and/or local level, based on a participatory process, involving in particular people living in poverty and other

[48] International Benchmarking Network for Water and Sanitation Utilities, Tariffs Map, available from http://www.ib-net.org/en/tariffs_map.php.

[49] Guy Hutton, "Monitoring 'Affordability' of water and sanitation services after 2015: Review of global indicator options", 20 March 2012, available from http://www.wssinfo.org/fileadmin/user_upload/resources/END-WASH-Affordability-Review.pdf.

[50] Ibid.

marginalized and disadvantaged individuals and groups, that consider all costs associated with water, sanitation and hygiene;

(e) Consider affordability standards together with other standards, particularly for availability and quality, to ensure that people can afford to pay for the services based on human rights standards;

(f) Ensure participation in the process of decision-making on determining mechanisms for allocating public financing and setting tariffs;

(g) Use public financing to support access for people living in poverty and those who are marginalized or discriminated against and eliminate inequalities in access to water and sanitation services;

(h) Give careful thought particularly to ensuring the affordability of sanitation provision, where costs are frequently underestimated;

(i) Focus on ensuring affordability for the most disadvantaged, including communities in informal settlements and communities that rely on self-supply, and explore different mechanisms to achieve this;

(j) Consider the impact of mechanisms adopted to ensure affordability, whether universal systems are actually universal in scope and reach beyond networked supply, and whether targeted systems (whether based on income, geographic location, type of access or other factor) in fact reach the intended beneficiaries;

(k) Put into place strong regulatory frameworks and bodies for ensuring affordability of service provision that covers all types of services;

(l) Address corrupt practices that add to the cost of service provision;

(m) Prohibit disconnections that result from an inability to pay;

(n) Monitor affordability of water and sanitation service provision through focused studies that examine income levels in different settlements, considering all costs relating to access to water and sanitation, including hygiene and menstrual hygiene requirements;

(o) Where prepaid water meters are considered, ensure that households that face an inability to pay are not disconnected from water supply and that quantity, continuity and quality of water meet human rights standards.

88. In addition, the Special Rapporteur encourages the treaty bodies and other human rights monitoring mechanisms to pay increasing attention to the affordability of water and sanitation service provision in the particular contexts people live in.

89. The Special Rapporteur encourages States and international organizations to further explore options for global monitoring that allow for more comprehensive monitoring of affordable access to services.

United Nations

A/HRC/30/39/Add.1

General Assembly

Distr.: General
6 July 2015

Original: English

Human Rights Council
Thirtieth session
Agenda item 3
Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report of the Special Rapporteur on the human right to safe drinking water and sanitation

Addendum

Priorities for the period 2014–2017*

Summary

The present report outlines the priorities of the Special Rapporteur on the human right to safe drinking water and sanitation during the period 2014–2017. The Special Rapporteur wishes to open up a dialogue with stakeholders worldwide and invite them to contribute ideas and suggestions that will enable him to carry out his mandate.

* The summary is being circulated in all official languages. The report itself, contained in the annex to the summary, is being circulated in the language of submission only.

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Annex

[English only]

Report of the Special Rapporteur on the human right to safe drinking water and sanitation

Priorities for the period 2014–2017

1. In the present report, the Special Rapporteur on the human right to safe drinking water and sanitation, Léo Heller, seeks to build on the legal and normative foundation of the human rights covered by his mandate, as described by the Committee on Economic, Social and Cultural Rights in its general comment No. 15 (2002) on the right to water and its 2010 statement on the right to sanitation (E/C.12/2010/1) and as affirmed by the General Assembly and the Human Rights Council in their respective resolutions since 2010. The Special Rapporteur takes into account the fact that Member States have affirmed that the human right to water and sanitation is derived from the right to an adequate standard of living guaranteed in the International Covenant on Economic, Social and Cultural Rights and other instruments of international human rights law. He also takes into account the fact that the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, the Convention on the Rights of Persons with Disabilities and the International Covenant on Civil and Political Rights also encompass the realization of the human right to adequate water and sanitation services for all.

2. During the period 2008–2014, the former Special Rapporteur on the human right to safe drinking water and sanitation, Catarina de Albuquerque, made a great contribution to the development of the normative content of the human right to water and sanitation and its underlying principles, mainly from a legal point of view, particularly through reports submitted to the Human Rights Council and the General Assembly. In addition, she engaged with a wide range of parties, including Member States, service providers, regulators, international organizations, civil society representatives, other special procedures mandate holders and human rights mechanisms, and developed a handbook entitled "Realising the human rights to water and sanitation",[1] a fundamental guide for the implementation of these rights in specific situations that should be promoted throughout the world.

3. The present report outlines the current Special Rapporteur's priorities during the period 2014–2017, which are the result of his thoughts and initial consultations and dialogues with key stakeholders. The Special Rapporteur recognizes the dynamic and fast-changing environment in which we live, and the consequent need to be open to adapting his plan of activities. Thus, one of the objectives of the present document is to open dialogue with stakeholders worldwide and invite them to contribute ideas and suggestions that will enable him to carry out his mandate.

4. The Special Rapporteur, with his unique experience in public policy on water and sanitation, intends to prioritize efforts to translate existing legal principles and norms into public policies and implementation mechanisms that contribute to the realization of the human rights to water and sanitation. By defining and framing such human rights principles as the principles of progressive realization and non-retrogression, of the maximum use of

[1] See www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/Handbook.aspx.

State resources and of equality and non-discrimination, the Special Rapporteur intends to inform public policies on the operationalization of that right.

5. The underlying objective of the Special Rapporteur is to support all Member States in respecting, protecting and fulfilling the human rights to water and sanitation. This implies Member States' adherence to both the normative content of these human rights (availability, accessibility, quality, affordability and acceptability, including dignity and privacy), as well as human rights principles (non-discrimination and equality, access to information and transparency, participation, accountability, sustainability, and progressive realization and non-retrogression). The Special Rapporteur will assist States in meeting their human rights obligations, facing possible challenges or limitations in doing so and planning ways to implement sustainable measures at the international, national and local levels.

6. The Special Rapporteur will encourage States to progressively realize the human rights to water and sanitation and to overcome challenges to such realization. Some types of water and sanitation services may not be fully aligned with human rights obligations, especially for the most marginalized and disadvantaged and for individuals in particularly vulnerable situations or with particular needs, such as people living in poverty, refugees and migrants, homeless people, prisoners, persons with disabilities and persons with chronic diseases. The Special Rapporteur will bring attention to sanitation and hygiene, which otherwise tend to be overshadowed by water issues. Challenges to realizing the human rights to water and sanitation may also be exacerbated in certain environmental, political, economic or demographic situations. In accordance with the international human rights framework, States will be reminded of their obligation to improve access to water and sanitation as expeditiously and effectively as possible, and will be encouraged to use the maximum amount of resources available to them to realize the rights to water and sanitation.

7. Important progress in realizing these human rights can be made by guaranteeing them in constitutions and national legislation, as well as by developing holistic and comprehensive national policies, regulations and budgeting frameworks that are supported and not constrained by international commitments and agreements. To date, a small number of constitutions contain references to the right to water, and even fewer to the right to sanitation. While an increasing number of States explicitly include the human rights to water and sanitation in their legislation, the Special Rapporteur intends to assist Member States that lack such legal recognition in enshrining these rights and in creating mechanisms and procedures that allow access to information, participation and accountability for these rights. Explicit inclusion of the rights to water and sanitation in national legislation is essential to assist individuals and groups in claiming these rights and to hold Governments accountable. Given that the national legislations of some countries refer to the rights to water and sanitation while also maintaining other national policies or laws, in particular regarding economic activities, that undermine it, the Special Rapporteur will remind States of the importance of harmonizing their legal and policy frameworks to ensure the protection of these rights.

8. The Special Rapporteur intends to continue to collect information on good practices related to all aspects of realizing the rights to water and sanitation. This includes strengthening legislative, regulatory and policy frameworks, as well as financing, service provision and accountability systems, as measures that can be taken by States to realize those rights. Good practices can be found in the experiences of partnerships between not-for-profit water operators, such as those supported by the Global Water Operators Partnerships Alliance of the United Nations Human Settlements Programme. These mechanisms deserve increased visibility, as they harness collaboration to empower utilities and other stakeholders to contribute to the progressive realization of the human rights to

water and sanitation. Numerous examples exist of utilities that uphold principles in water- and sanitation services, which often include transparency, inclusiveness and a culture of solidarity. The Special Rapporteur intends to identify lessons learned from successful initiatives around the world and to transfer the knowledge necessary for the formation of utilities that give priority to the realization of the human rights to water and sanitation, which is something to which all Member States and service providers must aspire.

9. The Special Rapporteur is especially interested in the formulation and implementation of the sustainable development goals to be adopted by the General Assembly in 2015 and, in particular, of proposed goal 6, which is to ensure the availability and sustainable management of water and sanitation for all. Furthermore, the human rights to water and sanitation are also essential, among others, to several other proposed goals, including goal 1, to end poverty in all its forms everywhere; goal 3, to ensure healthy lives and promote well-being for all at all ages; goal 4, to ensure inclusive and equitable quality education and promote lifelong learning opportunities for all; goal 5, to achieve gender equality and empower all women and girls; goal 10, to reduce inequality within and among countries; and goal 11, to make cities and human settlements inclusive, safe, resilient and sustainable. The Special Rapporteur intends to provide support and advice to Member States in formulating and improving the frameworks to monitor the progressive elimination of inequalities and emphasize participatory processes at national and local levels for the identification of disadvantaged groups. He will specifically address the challenge of monitoring gender inequality, as well as other dimensions of discrimination relating to access to water and sanitation. The Special Rapporteur will also assist in developing and implementing an accountability framework for the water- and sanitation-related goals and targets, in line with human rights obligations.

10. International cooperation and assistance provided by States, United Nations agencies, international development partners and donor agencies are important in supporting States to realize the human rights to water and sanitation. Throughout his mandate, the Special Rapporteur will attempt to reinforce the need to incorporate the content and principles of those rights into State policies and programmes. Furthermore, he will attempt to facilitate opportunities for United Nations agencies, international development partners and donor agencies to coordinate with States, service providers and civil society in the common goal of eliminating inequalities and realizing the human rights to water and sanitation for all. The goal for States is to implement the sustainable development goals in such a way as to prioritize the provision of water and sanitation services to its most disadvantaged populations. Indeed, the faster the gap closes between the most advantaged and the most disadvantaged groups and individuals, the closer States will come to accomplishing their goals with respect to promoting health and gender equality, eliminating poverty and creating inclusive, safe, resilient and sustainable cities, among others.

11. The human rights to water and sanitation, like all human rights, are indivisible and interrelated to all other human rights, including the rights to life, the highest attainable standard of health, adequate housing and food, education and the enjoyment of a safe and healthy environment. The Special Rapporteur intends to coordinate his activities with other special procedures mandate holders and treaty bodies in a joint effort to protect and promote all human rights. Where a violation of the human rights to water and sanitation is alleged, the Special Rapporteur will, as a matter of priority, hold dialogues with the States and entities concerned. When applicable, the Special Rapporteur will address the allegations together with other mandate holders, as violations of human rights often occur in a multidimensional context.

12. Special procedures mandate holders receive complaints about alleged human rights violations and issue letters of allegation and urgent appeals that, when the situation

warrants it, are followed by public statements. The Special Rapporteur intends to assess, as a matter of priority, whether complaints and allegations constitute a violation of the human rights to water and sanitation, to engage with States to ask for clarification about the existence of violations and to recommend measures for their remediation. Furthermore, he will reach out to people around the world, especially the most marginalized and those who lack access to communication tools like the Internet and media outlets, in order to raise awareness about the right to lodge complaints with human rights mechanisms, including the Special Rapporteur, and to assist those who are deliberately hampered from lodging such complaints. Cooperation with international and national non-governmental organizations and other non-State actors whose mandate is associated with the human rights to water and sanitation will be a powerful way to reach this objective. In this respect, the Special Rapporteur intends to establish communications tools and strategies aimed at reaching those who are most in need and at raising awareness of the human rights to water and sanitation.

13. The Special Rapporteur intends to collaborate with the academic community so as to encourage the production and continuation of research from a variety of disciplines that can increase understanding of, identify and assist in the realization of the human rights to water and sanitation. Water permeates all dimensions of human life, which is why a range of expertise can contribute to advancing studies oriented towards the realization of these rights. Solutions to situations of inadequate access to water and sanitation have been criticized as being treated in technocratic ways. Coordinating the mobilization of multiple research fields favours the identification of associations between technical solutions in the scope of water supply and sanitation services, different management structures, institutional structures, financial considerations, power relations, social complexities and other constraints, and the realization of the rights. The Special Rapporteur is also interested in models for assessing the realization of these human rights.

14. In cooperation with UN-Water, the Special Rapporteur intends to follow-up on the missions undertaken and the recommendations made during the period 2008–2014, with a view to ensuring long-term engagement with various stakeholders, developing more in-depth assessments and potentially making a greater impact than is possible with a one-off visit. In 2015, country missions to Botswana and Tajikistan have been confirmed. In general, the Special Rapporteur intends to give long-deserved attention to regions that have seldom been visited by this or other special procedures mandate holders, remaining attentive to States' particular situations. For instance, he will try to address the human rights situation in countries that have been facing crises, be they related to economic or environmental issues or to conflict.

15. The Special Rapporteur will develop thematic reports, to be presented to the Human Rights Council and the General Assembly, that focus on the main challenges for the realization of the human rights to water and sanitation. He intends to provide in-depth assessments, reflections and recommendations to concerned stakeholders around the world on the implementation of those rights. The reports he has prepared in 2015 are examples of this approach. They present a critical assessment and recommendations regarding mechanisms to ensure affordability (the subject of the report submitted to the Human Rights Council (A/HRC/30/39)) and the way in which one may associate types of services with the realization of human rights (the subject of the report to be submitted to the General Assembly at its the seventieth session). Indeed, the Special Rapporteur's thorough analysis of key themes, principles and practices will serve as a basis for establishing an effective dialogue with multiple stakeholders on essential issues related to eliminating inequalities in access and realizing the human rights to water and sanitation. The Special Rapporteur intends to address gender equality in his 2016 reports to the Human Rights Council and the General Assembly. He seeks to explore how women and girls are affected by the inadequate provision of water, sanitation and hygiene, including menstrual hygiene, and

will include recommendations on how to eliminate and monitor these inequalities. Future reports will focus on the following specific themes or cross-cutting issues, among others: different aspects of public policies (regulation, planning, legislation, service management and financing); the impact of crises and emergencies on inequalities in access to water and sanitation; accountability of Member States in the realization of those rights; hygiene as an inextricable component of the rights to water and sanitation; and capacity-building for the progressive realization of those rights.

16. The Special Rapporteur hopes that the priorities outlined in the present report will elicit suggestions, including on the themes of future reports, from Member States, civil society, international organizations, other mandate holders, service providers and regulators, and concerned individuals and groups. Moreover, the Special Rapporteur will make concerted efforts to obtain information from and exchange views with diverse stakeholders by convening consultations and designing and distributing questionnaires to Member States. He considers it of paramount importance that his mandate be used as an opportunity to channel the extensive range of expertise and experiences that already exists around the world into the common, universal goal of realizing the human rights to water and sanitation for all.

United Nations A/HRC/30/39/Add.2

General Assembly

Distr.: General
6 July 2015

Original: English

Human Rights Council
Thirtieth session
Agenda item 3
Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report of the Special Rapporteur on the human right to safe drinking water and sanitation

Addendum

Mission to Kenya*

Summary

In July 2014, the former Special Rapporteur on the human right to safe drinking water and sanitation, Catarina de Albuquerque, undertook an official visit to Kenya.

Kenya was one of the first States to explicitly recognize the human rights to water and sanitation in national legislation, and is undertaking legal and institutional reforms in the areas related to the provision of water and sanitation services. It is at a critical point with respect to translating its political commitment into the implementation and realization of those rights, which could be accelerated through the reforms. Kenya faces enormous challenges, including those related to access to sanitation in informal settlements and rural areas.

The Special Rapporteur encourages the Government of Kenya to place the human rights to water and sanitation at the core of the reform processes, and to prioritize the most marginalized groups. She makes several recommendations to address these challenges, and calls on the Government to urgently clarify the allocation of responsibilities in the provision of water and sanitation services.

* The summary of the present report is circulated in all official languages. The report itself, which is annexed to the summary, is circulated in the language of submission only.

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Annex

[English only]

Report of the Special Rapporteur on the human right to safe drinking water and sanitation on her mission to Kenya (22–28 July 2014)

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I. Introduction

1. The former Special Rapporteur on the human right to water and sanitation, Catarina de Albuquerque,[1] undertook an official visit to Kenya from 22 to 28 July 2014, upon an invitation from the Government, to examine the progress made and remaining challenges in ensuring the full realization of the human rights to water and sanitation in the country. During her mission she had the opportunity to meet with different interlocutors, including the Principal Secretary of the Ministry of Health and representatives of the Ministry of Foreign Affairs, the Ministry of Water and Irrigation and the Office of the Attorney General. She also met with local authorities of Kisumu County and Turkana County. She had meetings with a commissioner of the Kenya National Commission on Human Rights, the chief executive officer of the Water Services Regulatory Board, civil society organizations and bilateral and multilateral donors. She visited Kibera, an informal settlement in Nairobi, as well as several schools and communities in the country, and talked with community leaders, school pupils, teachers, water providers and health practitioners in Nairobi, Kisumu County (Kisumu city and Nyango subcounty), Homa Bay County (Kanyadhiang) and Turkana County (Lodwar city and Lolupe).

2. The Special Rapporteur expresses her appreciation to the Government of Kenya for the cooperation shown before and during the mission. She also thanks the United Nations country team, in particular the Office of the United Nations High Commissioner for Human Rights, for the support and assistance provided. Lastly, the Special Rapporteur wishes to thank all the people who took the time to meet with her and to help her better understand the situation of access to water and sanitation in Kenya.

3. As at 2012, Kenya had achieved coverage of 62 per cent with regard to access to improved water sources and 30 per cent with regard to access to improved sanitation.[2] Access to sanitation is a major challenge throughout the country. While the overall rate of access to water is increasing, access in urban areas has been decreasing owing to the growth of the population, and disparities are significant between formal and informal settlements and among wealth quintiles.

II. Legal, institutional and policy frameworks

A. Legal framework

4. At the international level, Kenya has ratified the main international human rights instruments, including the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities. Therefore, it has a legal obligation to take concrete and deliberate steps to ensure the progressive realization of the human rights to water and sanitation. The Government also has an immediate obligation to ensure access to water and sanitation facilities and service on a non-discriminatory basis, especially for disadvantaged or

[1] The present report is submitted by Léo Heller, who took up his functions in December 2014, after the mission to Kenya took place. All references to the Special Rapporteur in the present report are therefore to Ms. de Albuquerque.

[2] World Health Organization (WHO) and United Nations Children's Fund (UNICEF), *Progress on Drinking Water and Sanitation: 2014 Update* (2014). Available from www.wssinfo.org/fileadmin/user_upload/resources/JMP_report_2014_webEng.pdf.

marginalized groups. Kenya has also ratified a number of regional human rights treaties, such as the African Charter on Human and Peoples' Rights and the African Charter on the Rights and Welfare of the Child; the latter obliges States parties to take measures to ensure the provision of adequate nutrition and safe drinking water.

5. Safe drinking water and sanitation is a human right, derived from the right to an adequate standard of living, which is enshrined in, inter alia, article 11 of the International Covenant on Economic, Social and Cultural Rights. This right was explicitly recognized by the General Assembly in its resolution 64/292 and by the Human Rights Council in its resolution 15/9.

6. To be more specific, the human right to water and sanitation entitles everyone, without discrimination, to have access to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use, and to have physical and affordable access to sanitation, in all spheres of life, that is safe, hygienic, secure and acceptable, and that provides privacy and ensures dignity. This content of the right was explicitly recognized by the Human Rights Council in its resolution 24/18 and reaffirmed in its resolution 27/7. The realization of the human right to water and sanitation also requires ensuring access to adequate and affordable hygiene practices, including hand washing and menstrual hygiene management, that ensure privacy and dignity. Furthermore, effective measures have to be taken to ensure adequate disposal and treatment of human waste, including of wastewater. Even in cases of delegation of service delivery to third parties (private or public companies, for instance), the Government is required to regulate its activities to ensure that all aspects of the human right are guaranteed, prioritizing disadvantaged and marginalized groups.

7. Kenya was one of the first States to explicitly recognize the human rights to water and sanitation in national legislation. In article 43 of its Constitution of 2010, Kenya recognizes those rights by stating that every person has the rights to reasonable standards of sanitation and to clean and safe water in adequate quantities. Such an explicit recognition is a critical first step, since it provides a strong legal foundation for, and demonstrates a clear commitment to, realizing these rights for everyone in the country. In addition, article 56 of the Constitution provides that the State is to put in place affirmative action programmes designed to ensure that minorities and marginalized groups have reasonable access to water, health services and infrastructure, among other things. This is a uniquely strong provision, which reiterates a core human rights principle of equality and non-discrimination.

8. The Water Act of 2002 is the principal legal instrument in this sector; it provides for the management, conservation, use and control of water resources and for the regulation and management of water supply and sewerage services. It does not contain any reference to the human rights to water and sanitation. The Act provides the basis for the commencement of comprehensive reforms in the water sector, including definitions of the roles of the relevant actors. The Water Services Regulatory Board was established to set standards for the provision of water and sewerage services and to regulate service providers. The Water Resources Management Authority, the water services boards, the Water Appeal Board and the Water Services Trust Fund were also established under the Act.

9. Following the adoption of the Constitution of 2010, the Water Bill was drafted to provide for the regulation, management and development of water resources and water and sewerage services in line with the Constitution. Once the Bill enters into force, it will replace the Water Act of 2002. The Bill, which was gazetted on 17 March 2014 and was before the Parliament at the time of the visit, restates water and sanitation as human rights. The Bill prescribes the devolution of water and sanitation services in line with the Constitution, and proposes that water and sewerage services be provided by county-owned water service providers.

10. The Special Rapporteur welcomes the new Water Bill, which would guarantee the human rights to water and sanitation. She supports the provision on ring-fencing to secure funds within the sector and welcomes article 129 (3), which stipulates that "dividends or other payments shall not be paid to the owners of public water services providers as long as the universal rights of access to safe and clean water have not been achieved in the designated service areas". With respect to human rights standards, however, the Special Rapporteur is of the view that the Bill should include a provision clearly stating that the allocation of a sufficient quantity of water for personal and domestic use necessary to realize the human rights to water and sanitation should be prioritized over allocation for other water uses.

11. On-site sanitation is regulated by the Public Health Act and the Building Code. It is the responsibility of owners and constructors to have sanitation facilities in each house or building.

B. Institutional and policy frameworks

12. Since 2002, Kenya has been undergoing water sector reforms triggered by the Water Act.

13. The Ministry of Water and Irrigation has overall responsibility for the formulation, review and implementation of the water sector policy. Under the Ministry, the Water Resources Management Authority regulates water resources management and the Water Services Regulatory Board regulates water and sewerage services by setting national standards for water tariffs and quality, while issuing licences for water service providers. Two private companies, Runda Water Limited and Kiamumbi, participate in the provision of piped water in Nairobi, operating water supply systems.

14. The Ministry of Health has overall responsibility for on-site sanitation. It also monitors water quality and carries out sanitation and hygiene promotion.

15. In 2010, the new Constitution created 47 county governments and set up the framework of devolution of government functions. Under the Constitution, water resources management is separate from water and sewerage service provision. The responsibility for providing water and sanitation services is decentralized and devolved from the national Government to the county governments, while the competence over water resources management stays at the national level.

16. One of the intentions of devolution stated in the Constitution is to protect and promote the interests and rights of minorities and marginalized communities. The Special Rapporteur indeed observed in three counties that county-level government officials are closer to local communities and are better aware of the actual challenges and barriers to access to sanitation and water for all. She was also reminded of the importance of supervision or monitoring by the national Government and the independent regulator to ensure the transparency of the decisions and actions taken at the local level.

17. Devolution of responsibilities could be an opportunity to provide water and sanitation services that are tailored according to the needs and specificities of the local population. The State, however, cannot exempt itself from its human rights obligations by devolving the competence of service provision. Irrespective of the responsibilities of the county governments, the central Government remains the primary duty bearer for the realization of human rights.

18. In the current transition period of devolving competence for water and sanitation, there are several challenges in making the new system functional and several instances of ambiguity in the division of power and responsibilities between national and county-level

governments. For instance, the devolution of State functions has not been followed up with the necessary transfer of financial and human resources from the national to the county governments. Despite the enormous challenges in access to sanitation throughout the country, only three counties reported that they had adequate funding available to implement planned sanitation activities for the fiscal year 2013/14. The national Government should provide county governments with support to set up a service provision system. The county governments should identify the areas where they need technical and financial support and make specific requests to the national Government.

19. The provisions on the competent regulatory authority for water and sanitation services contained in the County Governments Act of 2012 contradict the Water Bill. The County Governments Act can be interpreted as giving the competence of regulation to county governments, whereas the Water Bill gives the Water Services Regulatory Authority the regulatory powers and functions to determine and prescribe national standards for the provision of water services, approve water and sewerage tariffs imposed by the county water services providers and monitor compliance with standards by the water services providers, among others. Once the Water Bill is in force, an explicit institutional set-up with a clear designation of regulatory roles and responsibilities across the national, regional and local levels will be indispensable and will provide the basis for accountable institutions. Hence, even in a decentralized system, the principal human rights obligations stay with the national Government, which has the obligation to oversee the overall realization of the human rights to water and sanitation. The national Government should set minimum mandatory standards for water and sanitation services, including on affordability, that comply with human rights and that will be the basis for county governments to define their own standards. Furthermore, an independent body such as the Water Services Regulatory Board should play an essential role in monitoring the compliance of service providers with the normative content of the human rights to water and sanitation. The roles of service provision and regulation must therefore be clearly separated.

20. At the policy level, Kenya also has an obligation to develop national standards and indicators that will enable it to monitor all elements of the human rights to water and sanitation. Such indicators should be designed not only to measure the outcome in terms of the rate of access, but also to capture the progress and efforts made by the Government.

21. In setting national and local standards, all levels of government are required to consider existing service levels; local context, such as the availability of water resources; and settlement types and densities. They may need to set interim standards, together with relevant targets and indicators, before the best possible standard is developed. Such targets must be time bound and tailored to meet the needs of particular population groups or settlements, taking into account the barriers that must be overcome. Data disaggregated by sex, rural or urban location, informal or formal settlement and advantaged or disadvantaged group is essential in order to fully understand where and how discrimination occurs with respect to access to water and sanitation. The indicators for the rights to water and sanitation developed by the Office of the United Nations High Commissioner for Human Rights (A/HRC/27/55, annex) could serve as a useful guide for Kenya in carrying out this exercise.

22. In order to start planning for the realization of the human rights to water and sanitation in the new framework, the Special Rapporteur calls on Parliament to urgently pass the Water Bill and clarify the competences of the national Government and county governments, in particular regarding regulatory roles. The clarification of responsibilities is indispensable for establishing which actors can be held accountable.

III. Human rights to water and sanitation

A. Access to water

23. The human right to water requires that the water supply for each person be sufficient and continuous for personal and domestic uses.[3]

24. As at 2012, 62 per cent of the Kenyan population enjoyed access to improved water sources. When breaking down this figure, significant inequalities are revealed between formal and informal settlements, and across wealth quintiles and rural and urban areas. While 82 per cent of people in urban areas have access to improved water sources, including nearly 60 per cent who have piped water on the premises, only 55 per cent of people in rural areas have access to improved water sources. During her mission, the Special Rapporteur visited several informal settlements where the residents' only option for access to water was to buy water from kiosks. Inequalities also exist within informal settlements; in such settlements in Mombasa, for instance, the vast majority of the poorest rely on water kiosks, while some of the richest inside the settlements have access to piped water.

25. Even when they have access to improved water sources, people make 7 to 28 trips to the water source per week.[4] For the majority of Kenyans, a significant part of daily life is still absorbed by collecting drinking water. In a survey carried out in multiple informal settlements, for instance, 40 per cent of households listed access to water as the most desired improvement in living conditions.[5]

26. Water quality standards in Kenya follow the guidelines provided by the World Health Organization. The Water Services Regulatory Board monitors and reports on the chlorine level and bacteriological quality of water provided by water service providers as part of its performance evaluation. The Ministry of Health also has responsibilities regarding water quality and carries out water quality surveillance in a number of districts. Water provision by vendors and tanker trucks introduces additional risks of contamination even when water is bought from the formal water service providers. The Special Rapporteur was informed that water quality monitoring for informal and small-scale provision, either by government actors or by users, is not routine and is insufficient.

B. Access to sanitation

27. Only 30 per cent of the population has access to improved sanitation: 31 per cent in urban areas and 29 percent in rural areas. At the current rate, Kenya would reach the target on sanitation of the Millennium Development Goals only in 2090, 75 years after the deadline. An estimated 13 per cent of the national population practises open defecation. When disaggregating the data by wealth quintiles, it becomes clear that open defecation is mostly practised among those in the lowest wealth category. The rate of access to sanitation also varies enormously between counties: the rate of open defecation is 82.1 per cent in Turkana and 0.2 per cent in Nyandarua, for instance.[6]

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[3] See Committee on Economic, Social and Cultural Rights, general comment No. 15 (2002) on the right to water, para. 12 (a).

[4] See United Nations Development Programme (UNDP), "Small-scale water providers in Kenya: pioneers or predators?" (2011), p. 26.

[5] Ibid.

[6] Kenya, Ministry of Health, and the Water and Sanitation Program, County Sanitation Profiles.

28. One of the systemic challenges hindering progress in access to sanitation in Kenya appears to be the law and policy that put the responsibility of providing sanitation facilities on individual households. Under the current structure, waterborne sewerage is the only part of sanitation systems that is under the direct responsibility of the service providers. Many households cannot afford to build sanitation facilities or have no authority to do so because they do not own the house or the building. While the relevant legislation, including the Building Code, contains provisions on sanitation and the local authorities are supposed to supervise their implementation, in many cases, particularly in informal settlements, the authorities do not oblige the building owners to provide sanitation when the building does not have such facilities. The National Environmental Sanitation and Hygiene Strategy 2010–2015 is based on the same foundation — taking a "community-led approach" — and explicitly states that the strategy does not propose any individual household-level hardware subsidies. Furthermore it establishes that to cater for the needs of the poor and vulnerable the strategy will rely heavily on community support networks (para. 6). The slow pace of progress in access to sanitation in the past decade in Kenya may be a signal that there are gaps, including poor budgetary allocation to the provision of on-site sanitation, in the system to progressively realize the right to sanitation.

29. The human rights framework does not require that the Government directly provide basic services for free. Rather, it requires the State to create an enabling environment for people to fully enjoy their human rights. However, in cases where people for reasons beyond their control cannot accede to their rights, including when they cannot afford to build sanitation facilities, the Government has the obligation to provide sanitation services directly.

30. The Special Rapporteur has learned that the Government does not invest enough in, or emphasize sufficiently, sewerage and waste water management. According to a census conducted in 2009, 74 per cent of households in rural areas and 62.5 per cent of those in urban areas relied on a pit latrine. In the global monitoring of the Millennium Development Goals, pit latrines are considered unimproved sanitation when they are public or shared or when they do not hygienically separate human excreta from human contact. The widespread lack of safe disposal of human waste is a serious threat to health in Kenya, and waterborne diseases are common. In 2009, over 3,000 people suffered from cholera and 40 of them died, and a cholera outbreak was reported in early 2015, at the time of writing the present report. About 17,000 children under the age of 5 reportedly die from diarrhoea every year.[7] The Special Rapporteur would like to reiterate that the human right to sanitation is not simply about access to a toilet; rather, it is defined as a system for the collection, transport, treatment and disposal or reuse of human excreta and associated hygiene (see A/HRC/12/24, para. 63). She is thus of the view that, to realize the human right to sanitation, the Government must ensure that toilets are hygienic to use and to maintain, and that waste matter is safely contained, transported, treated and disposed of or recycled. Waterborne sanitation is by no means the only acceptable solution; depending on the context, including the housing density and the availability of water, there are many other possible solutions. To safeguard the health benefits of access to sanitation and to protect water resources, standards and targets for the full cycle of sanitation provision must be set, from the collection of wastes to their transport, treatment and disposal or reuse.

31. The Government, with the support of UNICEF and the World Bank, has progressed in the collection of data on access to sanitation by county. The county sanitation profiles include assessments of indicators on the enabling environment for sanitation, including

[7] Kenya, Ministry of Health, and UNICEF, *Realizing Open Defecation Free (ODF) Rural Kenya: Achievements and the Road Ahead* (2014), p. vi.

indicators on financing. Collecting data and monitoring is essential for planning and budgeting, in particular to adopt affirmative action measures to support minorities and marginalized groups, as prescribed by the Constitution. The Special Rapporteur encourages the Government to continue its efforts and to further disaggregate data according to population groups, such as by sex, age, vulnerability and income level, in order to highlight patterns of exclusion and discrimination. The Government should also carry out a similar exercise on access to water at the county level.

C. Affordability of water and sanitation

32. To realize the human rights to water and sanitation, the price of water and sanitation and the direct and indirect costs and charges associated with it must be affordable and must not compromise or threaten a person's capacity to satisfy other fundamental human needs, such as for food or medicine. There are several different international recommendations regarding what percentage of household income should be spent on water and sanitation, but from a human rights perspective, additional measures must be put in place in order to ensure that no person who cannot afford to devote even such percentage to water and sanitation for various reasons is deprived of adequate sanitation and sufficient quantities of safe and accessible water.

33. In Kenya, only 20 per cent of the population have access to piped water on premises (44 per cent in urban areas and 13 per cent in rural areas). The rest rely on neighbours' taps, wells, water kiosks, rivers and other surface-water sources. The reported average water tariff of piped water in 2010/11 was 31 Kenyan shillings ($0.34) per cubic metre, and the price is much higher at unregulated water points. Even the tariff of piped water is likely to be hard to pay for those living on the lowest daily minimum wage (K Sh 264.50), and the higher price of unregulated water is unaffordable to those who are living in poverty.

34. The tariff guidelines developed by the Water Services Regulatory Board in 2007 provide clear guidance on how to set the water tariff. In the guidelines the Board encourages a pro-poor policy, for instance through the introduction of a "social block tariff" according to which a lower percentage of the average tariff is charged for the consumption of up to 6 cubic metres. It is also strongly recommended that water service providers adopt a "rising block tariff" for metred customers, and that they include sewerage costs according to the level of water consumption. In the guidelines, the Board also recommends that the water price per cubic metre at water kiosks should not be higher than the social block of the tariff.

35. The Special Rapporteur welcomes the positive measures included in the guidelines to ensure affordability for the poor. The rising block tariff encourages water savings and affordability for low-income households. However, the Special Rapporteur often observes problems with such types of tariff during her country missions: the poor are often charged a higher tariff because of their large families and shared water metres. The other issue with the guidelines is that some small-scale water providers, such as mobile vendors, are not covered by them and hence freely charge higher tariffs, although the Water Services Regulatory Board issues licences for small-scale providers that supply more than 20 households or more than 25 cubic metres per day. These very small-scale water providers are in fact the major water providers to the poor in very remote areas or in informal settlements.

36. During the visit, in her interactions with individuals living in informal settlements or otherwise purchasing water from water kiosks or informal vendors, the Special Rapporteur encountered many situations where the poor pay significantly more to buy minimum quantities of water than those who are connected to the water networks. While the tariff guidelines prohibit water kiosks from charging significantly higher than the social tariff

charged to those who are connected to pipes, the Special Rapporteur did not see those guidelines being followed. Twenty-litre jerrycans of water were sold for K Sh 5 in informal settlements in Nairobi. This is more than double the tariff of K Sh 2 per 20 litres approved by the responsible water service provider in Nairobi. In very remote areas in Kenya, 20 litres of water at water points were sometimes sold for K Sh 10. Still, the water price at water points is relatively low compared to other small-scale providers, such as pushcart vendors.

37. The prices charged by small-scale water providers are obviously unaffordable for many people in the country, where nearly half of the population lives below the poverty line. A study shows that approximately 63 per cent of households spend much more than 3 per cent of household income just on water.[8] This suggests that many people must either limit their water consumption to a level that threatens their health and hygiene practices, or compromise their access to other human rights, such as to sanitation, medicine and food.

38. In 2008, the Committee on Economic, Social and Cultural Rights recommended that the Government of Kenya should control prices charged by private water services and water kiosks (see E/C.12/KEN/CO/1, para. 30). It is urgent that the Government implements this recommendation and takes immediate measures to monitor and enforce the official tariffs for water kiosks. Generally people are prepared to pay a high price for water because it is essential for so many aspects of a person's life, but this does not justify a high affordability threshold. Affordability standards must be considered together with standards of minimum quantity of water or quality of sanitation to ensure that they are realistic. The Special Rapporteur calls upon the Government to correct the situation wherein an unjustified burden is placed on the poorest of the poor, who have no choice but to pay unaffordable prices for water. Such situations reflect a pattern of social structure where those who are better off benefit from development, including a subsidized supply of piped water and sanitation network, while the poor continue to pay higher prices for their minimum daily needs. Where the minimum standard of service is not affordable, States must provide alternative financial resources, for example, subsidies or grants.

39. It is also necessary to identify the poorest of the poor who cannot even afford the regulated price of water at water kiosks. This is a particular challenge, given that there is no social security system in Kenya. The Ministry of Water and Irrigation included a special pro-poor implementation plan and tariff adjustment through cross-subsidization in the implementation plan for the National Water Services Strategy. The Water Services Trust Fund, established under the Water Act of 2002 as a State corporation in order to assist in financing the provision of water services to areas of Kenya that are without adequate water services, conducted mapping of the water supply with socioeconomic data for pro-poor planning.[9] Collecting disaggregated data is an essential step in prioritizing those who have been marginalized. According to one assessment, however, despite the pro-poor policy, low-income households still do not enjoy affordable water and sanitation services, in particular because of the lack of financial and human capacities to monitor the compliance of licensed small-scale providers who often charge tariffs higher than the stipulated price. This is also owing to the fact that unregulated small-scale providers, who are the main suppliers for low-income households, fall outside of the regulatory framework, as stated above.[10]

40. The Special Rapporteur observed that, owing to such deficits in the policies, often the poor rely on community-based support systems; for instance, in Kibera, operators of

[8] See UNDP, "Small-scale water providers", p. 4.
[9] See the MajiData website (www.majidata.go.ke).
[10] See UNDP, "Small-scale water providers", p. 29.

public toilets allow the poor to use the toilet and pay for it when they have the money. While self-support systems are important safety nets, the realization of human rights cannot rely on such informal and random systems. The Government should strengthen the system to ensure affordability for the poorest of the poor by ensuring that the water tariffs are complied with by all and that even smaller scale providers must comply with water affordability standards, and also by ensuring that local authorities, service providers (formal and informal) and residents work together to find lasting solutions to the challenges of providing water and sanitation services in informal settlements.

41. There are reportedly complaints against Runda Water Limited alleging that it buys water from the Nairobi Water and Sewerage Company and sells it to customers at a much higher rate. The Water Services Regulatory Board, in its performance review report, states that Runda Water Limits is maintaining its good performance, although the assessment does not include the price of water and affordability.[11]

42. While water services providers are obliged to submit tariff adjustment proposals to the Water Services Regulatory Board, the monitoring of implementation of the tariffs by the Board does not appear to be systematic. The Board provides a customers' complaint system, but the Special Rapporteur recommends that the Board should proactively monitor compliance of the tariffs, particularly by small scale providers. The Government should provide the Board with the resources necessary to strengthen its monitoring capacity.

43. Similar affordability standards for sanitation must be established. In setting such standards, the Government must consider both on-site and networked sanitation and consider the full costs of sanitation, including the collection, transport and disposal or reuse of human waste.

44. In settlements that are not connected to the sewerage system, households often rely on tankers and other informal service providers to empty their pit latrines and septic tanks. These costs are often forgotten in assessments of affordability. Further, as informal service providers tend to be unregulated, they charge prices determined by what the market will bear or by price-fixing between providers, rather than by considerations of affordability. For example, there may be extra charges for distance or difficult access. The Government must therefore provide the financial and technological support necessary to improve the affordability and safety of sanitation services.

D. Availability of water supply

45. With respect to the human right to water, there is no definitive standard regarding a fixed daily quantity of water, hence the Government must assess local conditions and requirements and refer to relevant studies before setting standards for the availability of water and sanitation, which may include a specific number of litres of water to be available to each person or household per day. Children, pregnant women and people with chronic diseases are particularly vulnerable to illnesses, such as diarrhoea or cholera, when there is not sufficient water available.

46. The policy of Kenya is aimed at ensuring a minimum of 20 litres per day for everyone at an affordable price, as defined in the National Water Services Strategy, 2007–2015. While 20 litres may be an absolute minimum amount for survival — it is insufficient

[11] See Water Services Regulatory Board, "Impact: a performance review of Kenya's water services sector 2011–2012", p. 32.

to address all health concerns[12] — setting a clear minimum target is itself a positive step. With regard to its implementation, however, one study shows that 57 per cent of low-income households consume less than 20 litres per person per day.[13]

47. In terms of the availability of water resources, Kenya is a water-scarce country with less than 1,000 cubic metres of water available per capita. According to estimates in some studies, unless water supply increases as rapidly as the population grows, water availability in Kenya may drop down to 235 cubic metres per capita by 2025,[14] far below an absolute water scarcity line of 500 cubic metres per capita. The population of Kenya is steadily growing, and so do water demands. Water scarcity is also caused by poor water supply management, water contamination and increasing droughts and floods exacerbated by climate change.

48. To address the scarcity of water resources, public utilities regularly ration their water supply. As a consequence, the supply is unreliable. According to a study conducted by the Kenya National Commission on Human Rights, approximately 50 per cent of households have an unreliable water supply.[15] Since most small-scale water providers rely on piped water, their supply is also unreliable. Given the unreliable provision through piped connection by utilities, people tend to store excessive amounts of water, which in turn increases water demand against the intention of utilities to ration water consumption. The rationing of water through intermittent supply is therefore a false economy, as it invariably leads to increased losses.

49. Kenya must clearly prioritize available water resources for personal and domestic uses and allocate water in a transparent and participatory way over competing demands of water. Under the ongoing water sector reforms, the Water Act of 2002 and the National Water Resources Management Strategy define priority allocation of water for personal and domestic uses. Any plans for river basin or water resources management must reflect the obligations stemming from the human rights to water and sanitation. Equally, planning for resilience to climate change is essential for the protection of water resources, and requires careful consideration of how water can safely be reused in domestic, agricultural and industrial contexts. There is an additional need to adopt regulations aimed at giving "prioritization" and "availability" a practical definition by assigning standard numerical values to the minimum desired quantity and continuity of water and sanitation supply. To set these minimum standards, Kenya can use international research as guidance, while always taking into account people's particular needs and continuing to progressively increase minimum standards.

50. The Government itself stated in the Kenya National Water Development Report of 2006 that water resources had been mismanaged through laws, policies and institutions that did not take into consideration sustainable use of water and land, through weak practices of water allocation, through increased pollution and through degradation of surface-water resources. Kenya is not an exception among the countries in the region whose water resources are negatively affected by climate change. It is therefore even more important to set up a system to continuously monitor and evaluate the availability of water resources. It is also critical to strengthen the enforcement of relevant laws on illegal usages of precious water resources.

[12] Guy Howard and Jamie Bartram, "Domestic water quantity, service level and health" (WHO, 2003). Available from www.who.int/water_sanitation_health/diseases/WSH03.02.pdf.

[13] See UNDP, "Small-scale water providers", p. 4.

[14] See Kenya, *Kenya Vision 2030: First Medium Term Plan 2008–2012*, p. 107.

[15] Kenya National Commission on Human Rights, *The Third State of Human Rights Report: A Human Rights Assessment of Kenya Vision 2030 (January 2008–June 2010)* (2011), p. 86.

51. Kenya is undertaking water sector reforms for a better management of water supply. As mentioned above, the authority of water resources management remains with the central Government, and the authority over water supply has been decentralized to local authorities. Government officials informed the Special Rapporteur that they recognized that water resources management and the provision of water and sanitation services were sometimes inextricable and that the division of competence would not be clear-cut in reality. The Government needs to take a comprehensive approach, since the management of water resources and the management of water supply are inseparable for sustainable water provision.

E. Sustainability of water and sanitation services

52. Sustainability is a fundamental human rights principle and an essential element for realizing the human rights to water and sanitation. Services must be available for present and future generations, and the provision of services today should not compromise the ability of future generations to realize those rights, including with respect to the availability of water resources (A/HRC/24/44). Once services and facilities have been put in place, positive changes must be maintained and backsliding prevented.

53. The transfer of the competences of water and sanitation service provision from the national Government to county governments has given rise to a particular sustainability challenge: the Government needs to develop criteria to balance the allocation of water resources in order to meet water needs at both the national and local levels. Another challenge is financial sustainability. Since 2004, 118 water service providers have registered, including small-scale providers, community-based organizations and non-governmental organizations, but many providers are still unregistered. While the role of local small-scale providers has been increasing in areas such as public sanitation and secondary water supply through kiosks, vendors or tankers, those providers are reported to be struggling to recover operation and maintenance costs.

54. It is worrying that the level of access to improved water sources in urban areas has decreased from 92 per cent in 1990 to 82 per cent in 2012, largely attributed to the failure to extend services to keep pace with rapid population growth in urban areas. During the mission, the Special Rapporteur observed that several toilet facilities and water outlets built by the Government and donors were no longer functioning. In Kisumu County, she saw non-functioning and abandoned toilets in a school and water basins without water, taps or soap. The Special Rapporteur also observed this pattern in other counties. In several places where important projects had been implemented in the area of water and sanitation some time ago, often supported by donors, people complained that the cost for operation and maintenance had not been budgeted in the projects. According to UN-Water, in order to maintain the existing systems, 75 per cent of the water and sanitation budgets worldwide should be devoted to operation and maintenance.[16] Donors are strongly encouraged to factor in such expenses into project plans or to make an arrangement with the local governments before starting projects. County governments should also consider significant budget allocations for such purposes.

55. In addition, high levels of non-revenue water are another concern for water availability and sustainability in a water-scarce country like Kenya. In most of the country, 50 per cent of the water is lost owing to "illegal" connections, leakage and other technical problems. Water losses obviously threaten sustainability — both economic and

[16] UN-Water and WHO, *UN-Water Global Analysis and Assessment of Sanitation and Drinking-Water (GLAAS) 2012 Report: The Challenge of Extending and Sustaining Services*, p. 29.

environmental. More efforts have to be deployed in order to further decrease these losses, including through targeted investments for operation and maintenance. In parallel, the Government should take multiple measures to increase water availability, including by increasing rainwater harvesting and storage capacities.

56. The economic and social dimensions of sustainability must be balanced: while sufficient revenues need to be raised to ensure sustainability in service provision, this must be achieved in such a way that ensures affordability for all social groups, including those living in poverty. According to government officials, 60 to 70 per cent of the cost of water and sanitation services is covered by the revenue generated by those services. Cost recovery is an important element for a sustainable system, ensuring the coverage of operation and maintenance costs and supporting access to water and sanitation by the poor through cross-subsidies. According to one assessment, however, it cannot be expected that revenues will cover all the costs of the rehabilitation of the system, expansion of networks and affordable access for the poor in Kenya, given the challenges posed by old networks and high levels of non-revenue water.[17] This means that the water and sanitation sector in Kenya requires increased financial support from the Government and donors.

F. Right to justice and accountability

57. Article 33 of the Constitution guarantees the right to freedom of expression, which includes the freedom to seek, receive or impart information or ideas. In the water and sanitation sectors in Kenya, the Water Services Regulatory Board disseminates comprehensive information on the performance of water service providers using indicators.[18] That effort is an important step in monitoring the progress, identifying gaps and adjusting plans and budgets in order to progressively improve people's access to water and sanitation.

58. The Water Services Regulatory Board should be further strengthened to be able to proactively monitor the implementation of the human rights to water and sanitation, and not be limited to monitoring reports submitted by the utilities. Potential duplication of responsibilities for the inspection and monitoring of and reporting on water service providers should be clarified among the Regulatory Board, the water services boards and the Ministry of Water and Irrigation to establish the accountability of authorities.

59. The Kenya National Commission on Human Rights is an independent national human rights institution established under article 59 of the Constitution; it is accredited with "A" status by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights. The Commission assesses the Government's human rights performance and publishes annual human rights reports, which includes a section on the right to water and sanitation, and is an important part of the national human rights mechanism.

60. Access to justice in cases of alleged violations of the rights to water and sanitation is crucial to hold authorities accountable. Kenya has to ensure that the rights to water and sanitation are effectively enforceable not only at the national and subnational levels, but also at the international level. The Special Rapporteur welcomes that there are already a few cases related to these rights before national courts. She also calls on the Government to

[17] German Agency for International Cooperation, "Kenyan-German development cooperation in the water sector: assessment from a human rights perspective" (2007), p. 34.

[18] See Water Services Regulatory Board, "Impact".

accede to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

IV. Maximum available resources and budgeting for the rights to water and sanitation

61. Kenya has the human rights obligation to progressively realize the human rights to water and sanitation, using the maximum available resources, which include international assistance and cooperation. The national and county-level budgets must therefore have specific allocations or budget lines for water, as well as for sanitation and hygiene, including menstrual hygiene management.

62. In the 2015 Water, Sanitation and Hygiene (WaSH) Performance Index, a quantitative measure of the progressive realization of the human rights to water and sanitation, Kenya ranks 76th out of 117 countries. The Index compares the rates of change of specific countries in improving equity and access to water and sanitation to best-in-class rates of change among countries at similar levels of water and sanitation coverage to generate a benchmarked value. The ranking suggests that, compared to other countries, Kenya is not investing its maximum available resources to progressively realize the human rights to water and sanitation.[19]

63. During the mission the Special Rapporteur was informed that about 4 per cent of the national budget had been allocated for water and sewerage, although that included all water-related activities, such as water resource management and water for tourism, industry and other non-domestic uses. The budget of the Ministry of Water and Irrigation increased from 0.4 per cent of gross domestic product in 2003/04 to 0.9 per cent in 2008/09, and the majority of the budget growth was spent on water supply and sanitation rather than irrigation.[20] This means that the Government is allocating more resources to water supply and sewerage than before, which is a welcome step. However, the increased budget should be targeted to underdeveloped areas, such as rural regions, informal settlements and underdeveloped counties. In this regard, under the Constitution Kenya established the Equalisation Fund, to which 0.5 per cent of national revenue is allocated. The national Government uses the Fund to provide basic services, including water, to marginalized areas to bring the quality of those services to the level generally enjoyed by the rest of the nation. However, the Fund unfortunately cannot be used for sanitation. The Special Rapporteur calls on the Government to review the regulations of the Equalisation Fund and expand such funds to the area of sanitation and hygiene.

64. In the decentralized structure, the Constitution provides that "county governments shall have reliable sources of revenue to enable them to govern and deliver services effectively" (art. 175 (b)). The Constitution also prescribes that the Senate determines "the basis for allocating among the counties the share of national revenue that is annually allocated to the county level of Government" (art. 217). However, the Special Rapporteur was informed that for the fiscal year 2013/14, only three counties had adequate funding available to implement planned sanitation activities and 18 counties had no dedicated budget line for sanitation.[21]

[19] Ryan Cronk and others, "The WaSH Performance Index report" (The Water Institute at the University of North Carolina, Chapel Hill, North Carolina). Available at http://bit.ly/1RhieaX.

[20] African Ministers' Council on Water, "Water supply and sanitation in Kenya: turning finance into services for 2015 and beyond", p. 15.

[21] Kenya, Ministry of Health and the Water and Sanitation Program, County Sanitation Profiles.

65. Allocation of funds to the Ministry of Health for environmental health services started in 2008/09 and was doubled in 2009/10, which is another sign of commitment made by the Government. The budget seems to cover the salaries of thousands of environment health workers for hygiene promotion activities. However, this is still less than 0.1 per cent of gross domestic product. In addition, as stated above, the system appears to be based on an assumption that individual households cover most of the costs to install and maintain on-site sanitation. The very slow progress in rates of access to sanitation in the past decade (up from 25 per cent in 1990 to 30 per cent in 2012), however, shows that this assumption has proven to be not realistic. In any case, the Government has an obligation to allocate adequate budget for sanitation, hygiene and water in order to ensure the progressive realization of those rights. It also needs to develop strategies and incentives to encourage households to contribute to on-site sanitation.

66. Sanitation is a smart investment as well. The benefits of investing in water and sanitation are particularly evident in the area of improved health. Such investments prevent illnesses such as diarrhoea, reduce child mortality and increase adults' productivity and children's attendance at school. In 2012, 10 per cent of the deaths of children under five in the country, which has an under-five child mortality rate of 73 per 1,000 live births, was attributed to diarrhoea. According to a recent study by the World Bank, Kenya loses at least K Sh 29.6 billion (approximately $330 million) every year due to poor sanitation.[22] By improving both water and sanitation services, Kenya could save up to K Sh 145 billion annually.[23] Aside from monetary benefits, water and sanitation have other positive impacts on economic and sustainable development, such as dignity gained, progress towards realizing gender equality, the avoidance of environmental degradation and, where efforts are made to prioritize access for disadvantaged individuals and groups, the elimination of inequalities.

67. In Turkana County, for instance, over 80 per cent of the population practise open defecation. This absence of sanitation is causing water-borne diseases, including cholera outbreaks. In addition, Turkana County alone loses K Sh 1.1 billion each year due to poor sanitation, through, inter alia, time lost in gaining access to water, premature death, health-care costs and lost productivity. The county budget included a specific allocation for sanitation in the 2013/14 fiscal year for the first time. Despite the low levels of access and the huge losses caused by the lack of sanitation, only 0.05 per cent of the budget has been allocated to sanitation.

68. The Government developed a sector-wide approach to planning in 2006, and international assistance to the water and sanitation sectors, mostly in the form of loans, has increased significantly since then. The Special Rapporteur encourages donors to continue to support efforts in the water and sanitation sectors made by the Government and, at the same time, calls on donors and the Government to take targeted approaches to projects prioritizing the most marginalized people.

69. The Government should do more to ensure that more budgetary allocations are made to target the poorer rural and deprived urban areas, but also that already existing funds are better used to target disadvantaged individuals and groups. The process for determining allocations to different regions or areas should take into account existing disparities and inequalities, so that disadvantaged individuals and groups receive higher and targeted allocations even when they are living in regions that are otherwise adequately served.

[22] Ibid.

[23] Kenya, Ministry of Water and Irrigation, The Pro-Poor Implementation Plan for Water Supply and Sanitation (2007), p.13.

V. Marginalized persons

70. In Kenya, as in other countries, the situation regarding access to water and sanitation varies depending on one's location and on one's economic status. The Special Rapporteur will analyse the situation of some of the groups she met with during her visit and who have particular difficulties in gaining access to water and sanitation.

A. Persons living in rural areas

71. Despite general progress in access to water, inequalities in access to water in urban and rural areas are significant. The majority of the population of Kenya live in rural areas, and 23 per cent were still relying on surface water in 2012. While 44 per cent of people in urban areas have access to piped water, that percentage falls to 13 per cent in rural areas.[24]

72. The lack of access to water on premises means that people have to go out to collect it. In remote areas, water sources are far. In one very remote area in Turkana County, for instance, the distance to fetch water can be as long as 25 km. Water kiosks or other types of water vendors in rural areas are an acceptable interim solution, and they indeed improve the proximity to water sources in some areas. When waiting time at the water points is added, however, the total amount of time households spend on fetching water still tends to be significant. Also, as mentioned above, there is a systematic pattern of charging more to those who are not connected to the piped network or those living in remote areas. This disproportionately affects people living in remote areas and people living in poverty.

73. Access to sanitation is equally limited in urban and rural areas. Open defecation, however, is much more commonly practised in rural areas: 18 per cent of residents in rural areas engage in the practice, versus 2 per cent of the population in urban areas. It is particularly widespread in very remote areas.

74. In May 2011, the Ministry of Health, with support from UNICEF, launched the Open Defecation Free Rural Kenya 2013 campaign, employing the Community-Led Total Sanitation approach. The Special Rapporteur was pleased to see efforts made by the Government in the areas of Community-Led Total Sanitation and hygiene promotion advocacy. Access to information and hygiene education are essential to realize the human rights to water and sanitation. Under the campaign, of a total of 59,915 villages in Kenya, 9,126 (15 per cent) have been engaged with open defecation free processes, and 3,956 (7 per cent, or 45 per cent of the engaged villages) have pronounced themselves open defecation free. The Special Rapporteur visited an open defecation free village in Turkana County. She was impressed by the practical and simple toilets and the commitment made by villagers, although she also witnessed some evidence of continued open defecation practices by some, including children. There is still a long way to go to end open defecation and to achieve universal access to sanitation in Kenya. Political commitment needs to be supported by necessary budgets. The Government needs to revisit its allocation of budget and must prioritize support to realize access to basic sanitation.

B. Persons living in informal settlements

75. In urban areas, the situation in informal settlements continues to be particularly worrying. Urban informal settlements have been excluded from urban policies and planning by the Government for a long time, and this neglect has left people in extreme hardship.

[24] WHO and UNICEF, *Progress on Drinking Water*.

The Government has recently started to address access to water in informal settlements. The Special Rapporteur was informed that the Athi Water Services Board, for instance, has installed 15 washing facilities, 4 of which are biocentres in Kibera, the largest informal settlement in Kenya. In Kibera the Special Rapporteur visited a creative sanitation project established by the Umande Trust and UNICEF that is aimed at installing communal toilets and using the waste to produce biogas for cooking. Despite such efforts by civil society, donors and the Water Services Board, the communal sanitation facilities cover only about 20 per cent of the residents in the settlement. Other communal sanitation facilities the Special Rapporteur visited were not in a hygienic condition, and waiting lines at peak hours were long. In addition, communal toilets only partially meet the need if they are inaccessible at night, either because they are locked or because the journey to them would put the users at risk of attack.

76. The vast majority of people still rely on shared pit latrines that are manually emptied; the waste is disposed directly into a river or ditches. The Special Rapporteur also observed many tied plastic bags in the open ditch — a sign of the continuing practice of "flying toilets". This is not only a denial of dignity and of the right to sanitation, but a serious public health concern. Not surprisingly, health indicators in informal settlements are worse than those in the rest of the country.

77. WHO and UNICEF have revealed disparities inside settlements as well.[25] In informal settlements in Mombasa, open defecation is practised exclusively by the poor, while almost 70 per cent of those who are better off use flush toilets. A communal eco-toilet in Kibera visited by the Special Rapporteur, for instance, charges K Sh 5 per visit, which is not affordable for many residents. Such facilities are a great intermediate solution for high-density residential areas, however, many more targeted efforts by the Government are needed to ensure affordable, accessible and safe sanitation. In particular, this requires urgent measures by the Government to ensure that residents and owners are supported through the provision of information and subsidies to establish toilets — either flush toilets or latrines of adequate quality — in or next to their homes. Where residents rent homes from structure owners, the State must enforce the laws that require those who rent out structures to provide access to toilets that can be accessed at all times and without risk of harm.

C. Women and girls

78. Women and girls are not only disproportionately affected by the lack of access to water and sanitation but bear a heavier burden with respect to collecting water.

79. During the mission, the Special Rapporteur saw mainly women and children carrying yellow water jerrycans in every place she visited or passed through. In fact, one study shows that the majority of households put the responsibility of fetching water only on women and children, and only 15.7 per cent of households balance the work of fetching water between men and women.[26] This task obviously prevents women and children from exercising other human rights, such as the rights to work and to education.

80. Women and girls suffer the lack of sanitation and hygiene services differently because of their needs related to menstruation and their more acute needs for privacy and safety. One study provides specific examples of the impacts that women's lack of access to

[25] WHO and UNICEF, *Progress on Drinking Water*.

[26] See UNDP, "Small-scale water providers", p. 26.

sanitation, violence and poverty have in informal settlements in Nairobi.[27] Many women and girls in Kibera expressed to the Special Rapporteur their fears of being victims of violence, including sexual violence, when using public restrooms at night.

81. Menstrual hygiene management that ensures privacy and human dignity is an essential but often forgotten component of the human rights to water and sanitation. Many women the Special Rapporteur met with during the mission shared stories of how difficult it is to reconcile their menstruation days with attending school or working. A small pack of sanitary pads in Kenya costs K Sh 80 on average; women in informal settlements and girls in communities living in poverty all said they could not afford them and therefore used a piece of cloth instead. There are some initiatives to provide reusable sanitary napkins; however, in water-scarce areas or in slums where water is extremely expensive, reusable sanitary napkins are not a realistic solution as they cannot be washed. Without adequate menstrual hygiene management girls are often forced to miss five school days per month. The Special Rapporteur was impressed by the courage of one girl in a remote area in Kanyadhiang who openly said, after being asked what she wanted most to have a better life: "I want one more pair of panties because I only have one and I need to wash them daily. And I want sanitary napkins." In Turkana, the poorest county, the Special Rapporteur saw a positive effort where the county government provides sanitary pads to secondary school girls. She encourages all counties to adopt similar measures, to give menstrual hygiene greater political and budgetary visibility and to create a specific budget line for menstrual hygiene in their budgets.

VI. Conclusions and recommendations

82. **While Kenya is often invoked as a model at the international level owing to its constitutional recognition of water and sanitation as human rights and its development of legislation and policies based on those rights, there is still a long way to go to realize the human rights to water and sanitation for all. Much more needs to be done to translate the law into reality for the millions of Kenyans for whom these human rights are still only a mirage.**

83. **The State should use the opportunity presented by the current drafting of the Water Bill, as well as the upcoming water and sanitation strategy, to use the normative content of the rights to water and sanitation to guide actions in the sector. National mandatory minimum standards should be adopted, or, in some cases, maintained, for the legal content of the rights to water and sanitation, including tariff setting and water quality, as should regulations aimed at prohibiting water disconnections of those unable to pay, including public spaces such as schools, health facilities and prisons. The prioritization of the most marginalized individuals and groups, as provided for in the Constitution, should be clearly reflected in law, policy and financing.**

84. **In this regard, the Special Rapporteur recommends that the Government of Kenya:**

(a) Clarify the allocation of functions between various levels of government, and between various government departments, in the provision and regulation of the water and sanitation sectors;

[27] Amnesty International, *Insecurity and Indignity: Women's Experiences in the Slums of Nairobi, Kenya* (2010), p. 21.

(b) Ensure that the national Government remains the primary duty bearer for the realization of the human rights to water and sanitation while implementing the devolution of the competence of water and service provision;

(c) Include a provision in the Water Bill that provides an explicit prioritization of water for personal and domestic uses;

(d) Strengthen the Water Services Regulatory Board, by providing necessary mandates and financial and human resources, as a central regulatory board that sets national minimum standards and regulates the service provisions at the county level;

(e) Determine the budgetary implications of the envisaged regulatory activities and allocate sufficient financial and human resources to implement those activities;

(f) Ensure that water services boards effectively regulate small-scale informal water and sanitation service providers to ensure the quality and affordability of water and sanitation, particularly for the poor and the most marginalized;

(g) Ensure that those renting out residential accommodation provide access to sanitation that can be safely accessed at all times, including in informal settlements;

(h) Ensure the allocation and use of funds for the promotion and construction of on-site sanitation and safe disposal of human excreta;

(i) Establish clear budget lines to improve sanitation at the national and county levels, and earmark funds to target the most marginalized and vulnerable;

(j) Transfer necessary financial and human resources from the national Government to the county governments in the process of the devolution to establish the sustainable provision of water and sanitation services at the local level. The county governments should also make specific requests to the national Government;

(k) Invest in the maintenance and operation of new and existing services, including human resources, in order to avoid deterioration in the services currently provided, and provide financial and technical support to the counties;

(l) Allocate budget lines targeting the poorer rural and deprived urban areas and disadvantaged individuals and groups, taking into account existing disparities and inequalities;

(m) Strengthen the rights to access to justice and information for all, including by strengthening the existing independent institutions (the Water Services Regulatory Board and the Kenya National Commission on Human Rights).

85. The Special Rapporteur recommends that the international community:

(a) Increase funds to accelerate the realization of the human rights to water and sanitation in Kenya, targeting marginalized groups;

(b) Coordinate among donors and consult with the Government to increase targeted funds and technical support to help the Government to implement its strategies and plans prioritizing the most marginalized, including persons living in rural areas and informal settlements, as well as women and girls.